Realty Laws of California

Talks by

MELVILLE P. FRASER

Los Angeles

Clubs---The Drama.

L A Times Jan 10 1922

By the Federal Census—(1920)—576,673
By the City Directory—(1921)—770,301

TWO HELD FOR DEALS IN STOCKS.

Melville Fraiser Accused of Using Ore from Rich Mine to Increase Sales.

Accused of selling about $1,300,000 worth of stock in the Jerome-Superior Copper Company of Arizona, upon the representation that the core of a drill containing a high percentage of copper had come from that mine, Melville Fraiser, well-known Los Angeles attorney, president of the company, and George Mitchell, manager and chief engineer, were arrested yesterday by Deputy Sheriff Fox on grand jury indictments. They are accused of conspiracy to defraud.

The two appeared before Presiding Judge Willis, who released them on bail of $5000 each, for appearance in court for arraignment. According to Dep. Dist.-Atty. Stafford, who handled the cases before the grand jury, it is charged that the two and others asserted that the United-Verde, one of the richest copper mines in the country, drilled into the property of the Jerome-Superior Copper Company mine, and obtained therefrom the valuable copper drill core.

On these representations, it is charged a large amount of stock was sold in California. It is asserted in the indictment that the sample ore did not come from the Jerome-Superior property.

T. B. Connor was also arrested and lodged for a time in the County Jail on a grand jury indictment charging conspiracy to defraud. He was later released on bail until arraignment.

TURDAY MORNIN

Journal Aug 5 1922

ict Rocks Torrens Law, Realtors Claims

Torrens land title registration n somewhat emasculated, if , by a recent decision of the me Court of California, is on of prominent title men of ccording to a news bulletin he news department of the al Estate Association.
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me Court reversed the Dis- f Appeal and held, after an xamination of the Torrens the Torrens certificate held as void and of no value as ights of the power company. g paragraph of the decision rs:
sions of the land title law orts to entitle the pur- a registered title to the the actual possession and of another to hold the or to the prior rights and such possessor . . . are to the provision of the stitution, which provides s shall not be deprived erty without due process

ell, attorney for the State Company, filed a very ex- in the Supreme Court urg- Torrens certificates be up- eme Court disagreed with ed by Bell and held that, g the fact that Follette relied upon the Torrens certificate in good faith, it was void, and gave him no right to the property as against the title of the power company. San Francisco Recorder.

THE LAWYERS' BRIEF CASE

Compliments of the writer.

Dec. 29/17 M. P. Frasier

LAND TITLE ACT AT STAKE

Legality of Torrens Law May be Determined at Hearing Just Opened in Federal Court

A hearing that will go far toward determining the legality of the Torrens Land Title Act in California is now in progress before United States District Judge Bledsoe.

The title of the suit is the Francis Investment Company, a Utah corporation, against Friend J. Austin, H. T. Davis, Jasper Thomason, T. E. Gill and others. Gill is the only defendant at the hearing, as the others, it is said, have removed from Imperial Valley and cannot be located. The land consists of 160 acres, and it is alleged Gill paid $37,000 for the property in the vicinity of Calipatria.

TRUST DEED INVOLVED

It is charged that the plaintiff corporation had a trust deed on the land to secure the payment of $55,000, given by Austin, the original owner, and of whom Gill made the purchase. In October, 1917, Austin, through his attorney, H. T. Davis, also a defendant, brought proceedings to register the land under the Torrens Land Act free of the trust deed.

It is declared by the plaintiff that a false affidavit of service in the action was in evidence, and that the name of Francis Investment Company, holder of the trust deed, had been omitted. It is sought to foreclose the trust deed.

The questions to be determined are whether the fact that a title has been registered under the Torrens law is final as to ownership; whether the purchaser of real estate has been duly registered under the Torrens title law can depend on that decree alone, or whether it is the duty of the purchaser for his own safety to examine court records and proceedings in the matter.

Another point is whether a person must exercise reasonable diligence when securing a title under the Torrens law, or whether it is final as to ownership no matter how secured. If the court holds for the plaintiff corporation, and the judgment is affirmed by the Circuit Court of Appeal, it will mean that the Torrens Land Act is useless as a final arbiter of title, and that even under that enactment, it will be necessary to look into the records to see that the property is clear of all incumbrances—a task that is done by title companies that Torrens Land Act was supposed to supplant. Austin declares he is to be an innocent purchaser of the property.

RNIA, SATURDAY MORNIN

L. A. Journal Aug 5 1922

Court Edict Rocks Torrens Land Law, Realtors Claims

That the Torrens land title registration law has been somewhat emasculated, if not nullified, by a recent decision of the State Supreme Court of California, is the declaration of prominent title men of California, according to a news bulletin issued by the news department of the California Real Estate Association.

The case arose in Los Angeles County and was brought by C. Follette against the Pacific Light and Power Corporation. Follette obtained a Torrens certificate when purchased the property. The certificate did not show the right of way held by the power company. He paid the full value for the property and did not know that the power company claimed any interest in it.

The Supreme Court reversed the District Court of Appeal and held, after an exhaustive examination of the Torrens statute that the Torrens certificate held by Follette was void and of no value as against the rights of the power company. In the closing paragraph of the decision the court says:

> The provisions of the land title law which purports to entitle the purchaser of a registered title to the premises in the actual possession and occupancy of another to hold the same superior to the prior rights and interests of such possessor . . . are obnoxious to the provision of the Federal Constitution, which provides that persons shall not be deprived of their property without due process of law.

James W. Bell, attorney for the State Torrens Title Company, filed a very exhaustive brief in the Supreme Court urging that the Torrens certificates be upheld. The Supreme Court disagreed with the points urged by Bell and held that, notwithstanding the fact that Follette relied upon the Torrens certificate in good faith, it was void, and gave him no right to the property as against the title of the power company. San Francisco Recorder.

THE LAWYERS' BRIEF CASE

Compliments of the writer.

Dec. 29/17 M. P. Frazier

LAND TITLE ACT AT STAKE

L. & T. 10/5/23

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January 23, 1922.

C. A. Shallberg, Esq.,
Kennorthy, Dietz, Shallberg,
Harper & Bennett,
Peoples Bank Building,
Moline, Illinois.

Dear Sir:

Re: Estate of C. R. Stephens --
Illinois Inheritance Tax,
Federal Estate Tax.

Thanks for your letter of January 17th. It was received Friday the 20th just as I was leaving the city, so that I could not acknowledge it until today.

Your understanding of the California community property law is substantially correct so far as our residents are concerned, but the rule is different as to the real and personal property situated in California, but belonging to non-residents or acquired with funds brought here by persons formerly residents of other states. And of course C. R. Stephens

community property descends one-third to the wife and two thirds divided among the two or more children.

When non-residents of California or persons formerly residents of other states purchase real or personal property which is situated in California, the property so purchased retains the character which ~~it~~ the consideration had in the place of residence or former residence, and may be followed and given that same character even though the property so acquired be sold and proceeds reinvested here.. If, after they become residents of California, they acquire other property by the earnings of either, that property of course is community, and what they acquired by funds brought in follows the rule of the other state, unless and until there is an inextricable commingling, when all becomes community for want of any other solution of the confusion. For example, to cite an actual case we worked on here last year in a rather large estate: A man and wife lived together as residents of Montana for many years. They had no children. They had worked together almost fifty years, acquiring what they had. They sold out their ranches and came here. The old man still was industrious and active. As his payments came in from Montana he invested in suburban acreage. He subdivided, did some building on his new lots and helped some with the carpenter work. He sold at profits and bought again, and so on. He died without will, leaving wife. If community, 75% went to the wife, and with the additional widow's homestead allowance, the survivor would not fare so poorly. If the property followed the dower rule of Montana, the widow got only approximately 1/3, plus homestead and allowance. So common in this situation here that our local probate judge (of many years experience in this work) voluntarily and habitually inquired into the previous residence, etc., and refused to treat the estate as

REALTY LAWS OF CALIFORNIA

TALKS BY

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COUNSEL FOR TITLE INSURANCE COMPANY

LOS ANGELES, CALIF.

PRICE $5.00

SAMUEL M. CHORD

547 TITLE INSURANCE BUILDING

LOS ANGELES, CALIF.

COMMERCIAL PRINTING HOUSE
LOS ANGELES

FOREWORD

This work is not intended as a text book for lawyers, nor as a lawyer's book of reference. The writer has not sought to analyze the statutes and decisions as an aid to the practitioner. Rather has he sought to set forth in as clear a form as he might the elemental rules of law governing transactions in real property.

These talks are directed primarily to the one who contemplates entering into such transactions and are in the main in the nature of precautions to be observed.

In his thirty years' experience in the title business, the writer has seen so many instances of loss of money and rights through ignorance of these elemental rules that he deems it not unwise to give to the public the benefit of his research and observation.

He distinctly wishes it understood that this book does not purport to contain the law, but merely his comments on the law as he finds it, and his suggestions as to safeguards to be observed by his readers.

MELVILLE P. FRASIER.

Los Angeles, Cal., June, 1916.

INDEX

I.

History and Nature of Estates in Land in California

The territory now embraced within the lines of the State of California once belonged to Spain. Whatever law governing the ownership and transfer of property which may have been applied during the period of her sovereignty was the ancient Civil Law, derived almost in its entirety from the Roman Laws. Under this ancient Spanish law all real estate was deemed to be owned by the king. No individual could own what is termed in the common law of England a fee simple, that is to say, an absolute ownership of and dominion over the land itself. The king granted out to his subjects the use of lands on consideration of services, courtly favor or for a lump sum. The title, however, as we understand the term did not pass from the sovereign. When Mexico threw off the yoke of Spain and established her own independence the titles to all lands became vested in the State as sovereign and thereafter the State made such grants and concessions as were formerly made by the king of Spain. The system of granting lands in California from the sovereign arose sometime about 1780. The public authorities were permitted to grant out to individuals tracts of land to be used for stock raising in areas not to exceed three leagues, or nine miles square, provided the same did not interfere with the rights of any mission or pueblo already established. It may be noted here that the grants to the several missions of the lands surrounding them were of the mere right of use and occupancy. The missions were broken up by action of the Mexican Government between 1834 and 1840. Practically all personal property belonging to them was confiscated and their grants of lands were forfeited. Allotments were also made to citizens dwelling in pueblos of parcels for residence and for farms and gardens outside of pueblos. These grants were usually very vague and indefinite. Evidently it was considered that every man knew where he lived and where his garden might be, and it did not appear to be of any concern to other persons. Land was of little or no value and not much heed was given to questions of title or boundary. These matters were governed almost entirely by physical possession and but few disputes arose we may imagine, except as to the actual occupancy of Jose or Pedro.

California was during all these years and up to the time of the American occupation a colony of Spain and later of Mexico and was governed accordingly. It existed in theory for the use and benefit of the mother country. About 1830 the practice of granting titles by writings began. But very few were given before that date and they were not held in much regard. Gradually it became the custom of the pueblo authorities to grant such titles to such of the citizens who desired them and gradually it became the practice of the Mexican Government to grant such titles of ranches. After the United States succeeded to the sovereignty of Mexico over this territory a Land Commission was created by Act of Congress wherein claimants could advance their claim of titles to these lands. Disputes as to ownerships and boundaries were determined and upon recommendation of the Commission confirmatory patents were issued by the United States. So far as the writer is informed every such grant in the State has been so confirmed. It has been the custom and practice of the municipalities which were once pueblos to ratify the early grants of pueblo property by deed or ordinance. The general practice in this community is for the claimant to emplead the city in an action to quiet title. The city invariably disclaims except as to such rights as the public may have by reason of public ways or tax claims. It is safe to say there is but little land in this category within the boundaries of the City of Los Angeles the title to which has not been confirmed in the owner by deed from the city or by decree against the city. The troubles and disputes over Mexican titles speaking in a general sense as to inception have been forever buried. Here and there may arise disputes as to actual location of boundary lines or as to individual interests of claimants of which our courts have cognizance, but in a sense of confirmation by government authority the titles to the grants are forever settled. The United States succeeded to the sovereignty over these lands by the treaty of Guadalupe Hidalgo, entered into at the close of the Mexican War, and was the owner of all lands theretofore undisposed of to individuals. We have seen that by patents she confirmed such grants as had theretofore been made by the Mexican or Spanish government.

On September 9, 1850, California was admitted to the Union and by virtue of her sovereignty on that day became the absolute owner of all lands over which the tides of the sea ebb and flow; that is to say, all lands between the line of ordinary high tide and ordinary low tide, and all lands lying under navigable streams and lakes without any grant from the United States. This ownership is in the nature of a trust, however, for the public uses of navigation and fishery and these lands cannot be alienated by the State except

it be subject to such public uses. Franchises can be granted for use to individuals and grants can be made, but always there exists the inalienable ownership for these public uses. The State becomes a proprietor of other lands by purchase or condemnation and may hold lands for public buildings and the like and its ownership is that of any other proprietor, save as to liens, taxes and assessments, which do not attach.

By an Act of Congress, approved March 3, 1853, there was ceded by the general government to the State of California, the 16th and 36th sections in every township in aid of schools. These are known as "School Sections". The title vested in the State to the particular sections when upon being surveyed under the official system of the United States the surveys were approved and plats filed. No patent was necessary to convey the title to the State, as the Act of Congress was a grant in itself.

On September 28, 1850, there was given by Act of Congress to the State, all of the swamp and overflowed land lying within her borders. What constituted swamp and overflowed land could only be determined as the Government surveys were made. The act provided that surveys of such lands be made by Government Surveyors and lists thereof with approved plats returned to the General Land Office. As these lists were approved, patents from the United States to the State of California were issued. The decisions are conflicting as to the necessity for this patent, but the Department holds that such necessity exists. Therefore if you are offered land which has been sold by the State as Swamp and Overflowed land you must make enquiry of the United States Land Office to ascertain if the particular land has been patented to the State.

Other smaller grants were made from time to time by the United States to the State for University purposes and the like. It must be remembered that none of these grants applied to any lands lying within the Mexican grants confirmed by the United States. The United States system of surveys does not extend over the Mexican grants. In cases where the 16th or 36th sections had been disposed of by the United States before the cession to the State, the State is given other lands selected in lieu thereof. Title to these lands does not vest in the State or a purchaser from the State until properly selected and listed to the State as provided by the Act of March 3, 1853. In all cases when dealing with State lands enquiry should be made and the law studied to ascertain if the grant under which the State claims title requires patenting or listing by the United States in order to pass title. The lands so granted to the State are sold by the State outright to citizens of the State under laws relative thereto contained in the Codes. These grants to the

State passed all mineral titles of the United States and the patents from the State carry all mineral rights. It might be well to state in this connection that no lands are open to mining locations except vacant lands of the United States.

When California became United States territory, we inherited from Spain and Mexico, and adopted as our own, certain laws governing estates in real property which are in direct opposition to the common law of England, which law applies in most of the States of the Union, except as modified by statute. In many of its features, the tenure of lands in California bears no relation to that of the so called common law States. The estate of dower and curtsey never existed in California. Under the theory of the common law of England, husband and wife were but one person. The identity of the wife was sunk in that of her husband upon marriage. No so under the Civil Law, and which was handed down to California by Spain and Mexico. Under the community system so called, which has always prevailed in California, husband and wife are considered and treated somewhat as members of a partnership. The identity and individuality of the wife is not sunk in that of her husband and she has certain rights, privileges and duties under the law, as has the husband as we shall see later. This American community system prevails today in Louisiana, Texas, California, Nevada, Arizona, Washington, Idaho and New Mexico with some differences caused by statutory enactments.

As we have said, a marked distinction exists between the Civil and Common law in respect of the Civil rights and capacities of husband and wife. The Civil Law, which to that extent prevails in California does not recognize in the spouses that union of persons by which the rights of the wife are incorporated, during coverture with those of her husband. On the contrary, it regards the husband and wife as distinct persons, with separate rights and capable of holding distinct and separate estates.

The first constitution adopted by the State in 1849 contained the following clause: "All property both real and personal of the wife, owned or claimed before marriage, and that acquired afterwards by gift, devise or descent shall be her personal property." (Sec. 14, Art. XI.) The Constitution of 1879, Sec. 8, Art. XX, reads: "All property, real and personal, owned by either husband and wife before marriage, and that acquired by either of them afterwards by gift, devise or descent shall be their separate property." By an Act of the Legislature passed April 17, 1850, (Acts 1850, Chap. 103) it was declared that all property, both real and personal of the wife, owned by her before marriage and that acquired afterwards by gift, devise or descent shall be her separate property; and

all property both real and personal owned by the husband before marriage, and that acquired by him afterwards by gift, devise or descent shall be his separate property, and that all property acquired after marriage except as may be acquired by gift, devise or descent shall be common property. The husband was given the entire management and control of the common property, with the like absolute power of disposition as of his own separate estate. Thus we see that under this law any conveyance to either husband or wife, or to both after marriage, unless it could be shown that the acquisition was by gift, devise or descent, vested the title absolutely in the husband who could make deeds alone. Even if the deed ran to the wife in her own name, the deed by the husband without joining the wife was sufficient to pass title. This condition of affairs existed until 1891, when the Code was amended to read as follows:

"The husband has the management and control of the community property with the like absolute power of disposition other than testamentary, as he has of his separate estate; provided, however, that he cannot make a gift of such community property, or convey the same without a valuable consideration unless the wife, in writing consents thereto." This proviso was extended to furniture, furnishings and fittings of the home, clothing and wearing apparel of the wife or minor children, which is community property, by Amendment of 1901.

It is only in cases where the husband attempts to part with the community property **without a valuable consideration** that the consent of the wife is necessary. It is not necessary that she join in the deed, so long as she consent to the gift in writing. Yet, it is a common custom to require her to join in the deed as the best evidence of her consent. Often times, cases arise where it is impossible to secure the signature of the wife when sale is made by the husband. A purchaser is entitled to rely upon the right of the husband to convey if the consideration be valuable—not necessarily adequate. Thus if I take a deed from the husband and pay a valuable consideration, I am relieved from enquiring if the same be community property, or otherwise, for, if it be the separate property of the husband, the wife has absolutely no rights therein, and if it be community, the husband has the absolute right to convey alone, so long as the consideration be valuable. It is true that title companies will base their guarantees or certificates of title upon the presumption that the conveyance was made for a valuable consideration, but this difficulty can always be avoided by putting the transaction in escrow with the certifying company that they may know the consideration is valuable, and may preserve a record of the transaction.

If the conveyance be to either husband or wife, or both husband and wife, before May 19, 1889, or to the husband alone since May 19, 1889, and the property be common property, the husband can mortgage without the consent of the wife. If the deed be to husband and wife, or to the wife alone, since May 19, 1889, the wife can convey or mortgage her interest without the husband joining. All this, however, in the absence of declaration of homestead, for when the property has been declared a homestead at any time, the husband and wife must join in any conveyance or mortgage.

Sec. 162 of the Civil Code declares that all property of the wife owned by her before marriage, and that acquired afterwards by gift, devise or descent with the rents, issues and profits thereof is her separate property and that the wife may without the consent of her husband convey her separate property. Sec. 163, C.C. declares that all property owned by the husband before marriage and that acquired afterwards by gift, devise or descent, with the rents, issues and profits thereof, is his separate property. Sec. 164, Civil Code, at present declares that all other property acquired after marriage by either husband or wife, or both, is community property, but whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property, and in case the conveyance be to such married woman and to her husband, or to her and any other person, the presumption is that the married woman takes the part conveyed to her as tenant in common unless a different intention is expressed in the instrument, and this presumption is conclusive in favor of a purchaser or encumbrancer in good faith and for a valuable consideration.

It is provided that in cases where the married woman acquired title before May 19, 1889, the husband and his heirs are debarred from maintaining any action to show that the property was community property as follows: In cases where the married woman deeded before the passage of the act, one year after May 19, 1889, and in cases where she deeded after the passage of the Act, within one year after the date of the record of her deed. The object of this amendment is obvious. The law permits the husband to take the title to community property in the name of the wife. So long as she holds it and does not deal with it either with purchasers or encumbrancers in good faith and for value, the husband or his heirs, or his creditors are permitted to show that the property is in fact the property of the community and subject to the control and disposition of the husband. But where she has been held out to the world as an owner and entitled to deal with the property, the husband, his heirs or his creditors are estopped to deny this when

she has sold or encumbered in good faith for a valuable consideration. Therefore in cases where the wife has acquired title since May 19, 1889, it is not necessary that her husband join with her in any deed or mortgage unless the property be a homestead. The presumption in favor of a purchaser or encumbrancer in good faith and for value is conclusive and final and the husband, his heirs or creditors can never break through it. The Act was passed to relieve such purchasers or encumbrancers from making enquiry as to the nature of her estate. He is in no way concerned, for, if it be her separate estate, her husband never had any interest, and if it be community the law protects one so dealing with her by a conclusive, undeniable presumption that the property was in fact her separate estate. A clear understanding of this will facilitate such dealings. Often times the signature of a wife or husband is demanded to a deed or mortgage when there is absolutely no necessity for it. The law permits the husband or wife to deal with his or her own separate property without interference or control by the other.

A deed from one spouse to the other, or a proper contract for that purpose, has the effect to vest the property dealt with in the spouse receiving it as separate property. The rights of husband and wife as to any property may be fixed by marriage contract irrespective of the statute. It may be well to note here to what extent the property of the spouses is liable for the debts of either. The property of the community is not liable for the contracts of the wife made after marriage unless secured by a mortgage or pledge thereof executed by the husband. The separate property of the husband is not liable for the debts of the wife contracted before the marriage. The separate property of the wife is liable for her own debts contracted before or after her marriage, but is not liable for her husband's debts; but such property is liable for the payment of debts contracted by the husband or wife for the necessaries of life furnished to them, or either of them, while they are living together. But this proviso only applies to such of her separate property as may be such by reason of a gift from the husband. For civil injuries committed by a married woman, damages may be recovered from her alone, and her husband is not liable therefor, except in cases where he would be jointly liable with her if the marriage did not exist. The wife must support the husband, when he has not deserted her, out of her separate property, when he has no separate property, and there is no community property, and he is unable from infirmity to support himself.

Reverting to the topic of ownership of Estates. The ownership of property by a single person or corporation is known as a sole or several ownership. Here no question as to interest arises. The ownership of property by several persons is either:

1. Of joint interests.
2. Of partnership interests.
3. Of interests in common.
4. Of community interest of husband and wife.

A joint interest or joint tenancy, as it is generally termed, is a peculiar estate in this: It is one owned by several persons, in equal shares, by a title created by a single will or transfer when expressly declared in the will or transfer to be a joint tenancy, or when granted to executors or trustees as joint tenants (Sec. 683 C.C.). The essentials to the creation of such an estate are these: that the title be conveyed by one instrument which expressly declares that the same is to be held in joint tenancy. The effect of such a grant or will is to vest the title in each and all; that is to say, that each grantee or devisee, as among themselves and as to succession, owns all the title at all times so that the death of one of them does not change the title at all. It rests as under the original creation in the survivors. This fiction of the law has no bearing on the rights of strangers to the title. It only exists to give the right of succession to a survivor. This theory of joint ownership is of no concern to a grantee, mortgagee or creditor of any joint tenant. It applies only to the tenants themselves and among themselves. The share of one of the tenants dying does not descend to heirs nor can it be willed away from the survivor. The last survivor holds all as he did from the creation of the estate. This plan of vesting an estate is most often resorted to in the creation of trusts or in devises to executors. It has become, however, a common practice in this community to create such an estate in husband and wife in cases where it is desired that the survivor shall have all.

The joint tenancy can be destroyed at any time by one of the joint tenants conveying his interest to a stranger or by deed by either spouse to the other if the joint tenancy be in husband and wife, or by execution sale of the interest of either. A corporation cannot be a joint tenant nor can a joint tenancy be created by any person but the grantor or devisor. It cannot be created by agreement nor by deed between the parties themselves. It MUST be by transfer or will. Personal property such as notes, bonds and shares of stock can be held in joint tenancy, for the execution and delivery of the security or shares of stock is equivalent to a grant. By special statute, bank accounts may be held in joint tenancy. These estates are not favored in law as they tend to cut off the natural rights of heirs and great care must be exercised in their creation as I shall point out when we come to the subject of deeds. A partnership interest is one owned by several persons in partnership for partnership purposes. (Sec. 684 C.C.)

It must be remembered that a partnership as such, or any association of individuals as such cannot take title. Those who compose a partnership or association may own property, but as such partnerships or associations they cannot be grantees for there is no legal entity. In the case of a partnership to vest a title in the several partners, the deed must run to them in their individual names. Whether or not it be partnership property is only the concern of the partners or their creditors. One taking a deed from the partners is in no way concerned. If a deed run to "Sunset Realty Company, a partnership," the deed is void. If it run to Sunset Realty Company, composed of John Smith and William Jones, the individuals take title and the deed out must be from them. If the deed run to George Smith & Co., a partnership, the title vests in George Smith, and a deed from him will pass the title. Purchasers dealing with partnership property may treat the partners as tenants in common.

An interest in common is one owned by several persons, not in joint ownership or partnership (Sec. 685) and every interest created in favor of several persons in their own right is an interest in common unless acquired by them in partnership, for partnership purposes, or unless declared in its creation to be a joint interest.

The difference between joint tenancy and a tenancy in common is this: In a tenancy in common each tenant owns a proportionate share of the property, which descends to his heirs, his interest being severed from that of his co-tenants. His conveyance of his interest to a stranger does not destroy the estate: He may hold, say, one third in interest, and his co-tenant two thirds. Under a joint tenancy the shares are equal; as between the tenants each owns all. Upon a severance of a joint tenancy by the conveyance of one tenant the estate then becomes a tenancy in common among the owners. Where there be three joint tenants and one conveys, his grantee takes a third interest as tenant in common; the others holding between themselves the remaining two thirds as joint tenants.

There is but little practical difference between these estates, except so far as they affect trusteeships and heirs and creditors of the tenant after his death. Upon his death his interest is gone—there is no estate in him. When alive he can deal with the property by deed or mortgage, and his interest is subject to execution. In no case can either estate be subject to homestead except in cases where husband and wife are the joint tenants or co-tenants. In every other instance, such estates can be as freely dealt with as sole estates.

In conclusion, I call to your attention some things you will do well to remember. Remember that an estate in lands cannot be

held by a partnership as such, or, an unincorporated association as such; that a deed to "Sunset Realty Company", if it be not a corporation, is void; that a deed to "Sunset Pleasure Club", it being an unincorporated association, is void. When tendered a deed from such a grantor, refuse it, for it passes no title.

Remember that the wife has no control over the common property. Do not extend her credit where her only claim to property is a community interest, without the contract of her husband.

Remember that the husband's separate property is not liable for the debts of the wife contracted before marriage, so do not extend credit to a lady without separate property on the strength of her impending marriage to a rich man.

Remember that the wife's separate property is not liable for the husband's debts. There is nothing in the law which forbids or prevents the wife from paying the husband's debts out of her separate estate, if she chooses so to do, but all contracts with a stranger whereby her separate estate is sought to be bound for her husband's debts are void unless the consideration moves to her. Therefore, when you know, or have reason to believe, that the separate property of the wife is being mortgaged, or pledged, to secure a debt of the husband, require the wife to sign the note and mortgage or other security, and pay the proceeds to her alone. When she has received the consideration it is no concern to the one dealing with her what use she makes of them.

Remember that the wife can convey or mortgage her separate property or that which is presumed to be her separate property, in cases where she has acquired title since May 19, 1889, without the consent of her husband.

Remember that the husband can convey or motgage his separate property without the consent of the wife and can always mortgage the community property without the consent of the wife and can convey the same without her consent if he receives a valuable consideration. Remember that the interest of a joint tenant in lands held in joint tenancy ceases upon his death. The estate does not descend to the heir. There is nothing to administer upon. His interest dies with him. Be cautious then in extending too liberal a credit to one whose property is so held unless you take a mortgage or pledge of the property so held. The lien will survive his death, but an unsecured debt is no claim against the property after his death.

Remember that in all cases where the property is a homestead, husband and wife must join in deeds or mortgages, no matter what the nature of the estate may be, and that their act must be a personal one by one instrument. They cannot act in dealing with the homestead by an attorney, in fact.

II.

Essentials of a Deed

Any form of written instrument which contains apt words of conveyance, such as "grant," "transfer," "sell and convey" and the like is sufficient to pass title to lands in California. There is no fixed and absolute form. Section 1092 C.C. provides that a grant in real property may be made in substance as follows:

I, A. B., grant to C. D. all that real property situated in (insert name of County) County, State of California, bounded or described as follows: (here insert description). Witness my hand this..... day of..... Signed, "A. B."

This form of deed is much used, and is sufficient to pass the full fee and any title which the grantor may afterward acquire which may be adverse to that granted by the deed. A quit claim deed may be in the same form, changing the word "grant" to "remise and quit claim" or simply "quit claim." A quit claim deed passes the title of the grantor as fully as a grant deed to all interest owned by him at the date of the deed, but does not pass any title which he may subsequently acquire adverse to that which he has quit claimed. A deed containing the words, "grant all my right, title and interest in," etc., is a quit claim. Care must be exercised in using the code form of deed to insert the proper personal pronoun, either "I" or "We," as the case may be, before the names of the grantor or grantors, and to insert the name of the grantor or grantors in the body of the deed.

A transfer is defined by the Civil Code to be an act of the parties, or by the law, by which the title to property is conveyed from one living person to another. Property of any kind may be transferred, except a mere possibility not coupled with an interest. Thus the possible future interest of a son in his father's property, which may upon the death of the father vest in the son, is not transferable. Likewise the possible interest of the wife in the community property which may be hers upon the dissolution of the community by death or divorce, is not transferable by her alone. A conveyance may be made of all property owned by the grantor at the date of the conveyance in general terms, but such a conveyance will not pass title to property subsequently acquired by the grantor,

for there can be no delivery as to such property when the deed passes, and, as we shall presently see, a deed without delivery is a nullity.

We come now to consider who may acquire and dispose of property. In general, every person who is legally competent to bind himself by contract may convey his property by deed, or may empower another to do so for him. There are certain disabilities under which persons may be laboring that render them incapable of making a valid contract; such as the disability of infancy or insanity. Corporations may acquire and convey property as freely as natural persons, except that the law weaves about their transactions certain formalities which must be observed. There are statutes restricting nearly every corporation in the amount and nature of property which may be owned by it, but these are of no concern to the person dealing with its property. No individual is permitted to question the legal right of any corporation to acquire or dispose of property. This is a question for the State alone. The State may at any time proceed against a corporation to compel it to dispose of its property held contrary to law and may forfeit its franchise for disobeying the mandate of the statutes, but no individual is required to ascertain when he deals with a corporation if it holds property in excess of the statutory limit. A deed to pass title to a corporation must name the corporation, as such, as grantee. A deed to the directors, or officers or stockholders will not vest title in the corporation. In conveying land the corporation can act only through its board of directors or trustees acting as such at regular assembled meetings. The directors cannot act as individuals—they must act as a board. The officers of a corporation have no power to convey property without the authority of the board of directors or trustees acting as such. It follows that one dealing with a corporation whereby he receives a conveyance or mortgage must be assured that the officers executing it were authorized so to do by the governing body of the corporation. The recital in the deed that the same was duly authorized is **prima facie** evidence of the fact and may be relied upon if no other circumstances appear to excite enquiry. Where these recitals do not appear enquiry must be made to ascertain if in fact the conveyance was authorized. A conveyance executed by any officer or officers, and not in the name, and as the act and deed of the corporation is a nullity and no subsequent resolutions of the governing board can make it good, for a void deed cannot under any circumstances be made a good deed. Under certain circumstances, as where the corporation has received the proceeds, it will be estopped in law from denying the deed, but this doctrine of

estoppel does not operate to make a void deed a good deed. It is merely an application of the doctrine that no man shall be permitted to take advantage of his own wrong.

If the public records do not disclose the contrary one is entitled to rely upon the presumption that his grantor holding itself out and describing itself as such in its deed is a legally organized and existing corporation. The certificate of incorporation by the Secretary of State is sufficient evidence of the legality of the corporation and its right to do business, for no individual can question these matters when the State has once granted a charter.

In California, where corporation charters are forfeited automatically upon failure to pay franchise or license taxes, one must ascertain by examination of the records in the County Clerk's office or of the records of the Secretary of State, whether or not the charter of his grantor has been forfeited. Upon forfeiture of its charter the corporation no longer exists. The board of directors as such, and all officers, as such, of the defunct corporation, have no powers. A corporation may by proper proceedings taken in court be dissolved and the court will appoint a trustee for the stockholders and creditors to wind up the affairs of the corporation. The title to all property of the late corporation is vested in the trustee for that purpose by deed of all property made by the corporation before its dissolution or by operation of law after its dissolution. He does not act in an individual capacity. His deeds must contain recitals as to his capacity and authority, otherwise it passes only such individual interest as he may own.

When the charter is automatically forfeited the title to all property is vested in the members of the Board of Directors in office at the date of forfeiture, as joint tenants, and as trustees for the creditors and stockholders of the late corporation. They no longer act as a Board of Directors, but the full title to the property is vested in them and the survivors of them. They cannot make deeds in the name of the corporation, for it no longer exists. Unfortunately our statutes provide no method of giving public notice of the identity of such trustees. One dealing with such trustees must make investigation to ascertain who were in fact the directors in office at the date of the forfeiture, and if his grantors be all of such persons or the survivors of them. It is upon this investigation and recitals in his deed that he must rely. Hence it is important, and in my opinion necessary, that the deed from the trustees recite the fact of forfeiture, the names of the persons who became trustees, the names of those who survive and are acting, and the capacity in which they act. The deed must be executed and acknowledged as trustees for the creditors and

stockholders of the defunct corporation. It must be remembered that there are no statutory forms of such deeds, hence it is highly important that the deed contain every detail of devolution of title and capacity of the grantors, for upon these recitals the grantee is compelled to a great extent to rely. Remember also that **all** of the trustees or survivors must act for the full title is vested in each one of them. The execution by a majority is not sufficient. **All** must join in the deed. No one of such trustees can convey to the others, nor can he delegate his powers to any of the others, for his is a trusteeship. And such trustee powers cannot be delegated in absence of statute authorizing such delegation.

Minors in this State are males under 21 years of age and females under 18 years of age. A minor cannot give a Power of Attorney, nor, being under the age of 18 years, make a contract relating to real property. Such a contract made by a minor under the age of 18 years need not be disaffirmed by the minor either before majority or within a reasonable time afterwards, or in case of death by the heirs or personal representatives of the minor for the contract is void from the beginning. And if the contract be made by a minor whilst he is over the age of 18 years it may be disaffirmed by the minor himself upon reaching majority, or within a reasonable time thereafter, or by his heirs or legal representatives, if the minor die within the period upon restoring the consideration to the party from whom it is received or paying its equivalent. It would thus appear that any contract in relation to real estate made by a female minor, or a male minor under the age of 18, is void and no disaffirmance is necessary.

A minor, however, cannot disaffirm a contract otherwise valid to pay the reasonable value of things necessary for his support, or that of his family entered into by him or her when not under the care of a parent or guardian able to provide the same. The deed of a minor over the age of eighteen is not void but voidable only. The title passes subject to be defeated by disaffirmance by the minor, or the heirs or personal representatives of the minor. The time within which he must disaffirm is not settled. It depends entirely upon the circumstances of each individual case. The term "within a reasonable time" is an elastic one. It is therefore wise in taking a deed to know that your grantor is of full age.

A person entirely without understanding has no power to make a contract of any kind, but he is liable for the reasonable value of things furnished to him necessary for his support or the support of his family. A conveyance or other contract of a person

of unsound mind, but not entirely without understanding, made before his incapacity, as has been judicially determined may be rescinded by such person if he proceed promptly to restore to the other party, or offer to restore everything of value which he has received. After his incapacity has been judicially determined a person of unsound mind can make no conveyance or other contract, nor delegate any power or waive any right, until his restoration to capacity. A certificate from the medical superintendent or resident physician of the insane asylum to which such person may have been committed, showing that such person has been discharged therefrom cured and restored to reason, is sufficient to establish the presumption of such person from the time of such discharge. So the deed of one who has been adjudged insane after such judgment and before restoration to capacity is absolutely void. So also is the deed of an incompetent while he has a guardian.

The question naturally suggests itself what enquiry should one make when tendered a deed as to the legal status and capacity of all persons who may appear in the chain of title. Manifestly it is impossible in every case to investigate with any degree of certainty or hope of success of ascertaining if every grantor in the chain of title was an adult of sound mind and under no legal restraints. I conceive it to be the legal duty of one purchasing land to ascertain by proper enquiry if the person from whom he is about to take a deed has legal capacity to deed. Surely this is not onerous. If he be a purchaser in good faith and for value and without notice, actual or constructive, of any such defect in title, he is protected, provided he has used ordinary care and diligence. The law does not impose upon him impossible conditions, but he is not protected if he has actual knowledge that his grantor has no capacity to contract, or if he has knowledge of such facts and circumstances as would put a prudent man upon enquiry. If the defects appear of record he is bound whether he has actual knowledge or not. The notice given by public records is termed "constructive notice," and such facts as are disclosed by the public records are notice to the whole world of claims of right, or possible claims of right, and one dealing with the land affected thereby is bound by such notice regardless of any enquiry. He is not an innocent purchaser if facts appear in the record which are sufficient to put a prudent man upon enquiry as to their truth. Thus if it appear by the public records that "A," the grantor in a chain of title, was a minor at the date of the deed, "A" may disaffirm and recover the land from any subsequent grantee if he proceed in time for any grantee is held to have notice from the record of "A's" legal right. Like-

wise if it appear from the record, we will say, in proceedings wherein "A" was adjudged to be insane and committed, and it appear from the proceedings that he was insane at the time he made his deed this fact is enough to give notice to any subsequent grantee that "A" has a right to rescind upon restoration to capacity. Again, if the record discloses that the deed was made by "A" after commitment, or after the appointment of a guardian, any grantee must be held to have notice that his deed was void and "A" can recover the land from any grantee. Not so, however, if the record be silent. If there be no record notice of disability of any character and one purchases for a valuable consideration and without knowledge of any such defect he is protected by law in his purchase, and the one seeking to disaffirm or rescind must look to the proceeds of sale and not to the land itself. It must be borne in mind that a purchaser is not innocent who has knowledge of such a defect, or has such information relative thereto that by careful enquiry he could learn the true state of affairs. He is held to be bound by such facts as he might have discovered had he made enquiry. In this category full deeds executed by a person in such a state of intoxication that he is incapable of giving an intelligent consent to a contract, and those executed by persons under duress, restraint or undue influence, and deeds secured by fraud and misrepresentation. All such deeds are voidable, not void. As the record by the nature of things, will not disclose these facts, an innocent purchaser for value is protected. But any circumstance or fact coming to the knowledge of an intending purchaser sufficient to put him upon enquiry as to such defects takes him out of the class of innocent purchasers.

We have on the statute books of California what is termed the Alien Land Law, whereby persons not eligible to citizenship are prohibited from owning lands within the State. Likewise we have a law which prohibits foreign corporations from dealing in lands in this State unless they shall comply with requirements, certain Acts of the Legislature. It is sufficient to say that no individual is concerned with the enforcement of these laws. No individual can question the right of any alien to own land, and it is not encumbent upon any individual to enquire whether his grantor or grantee be an alien. It is a public question solely and the penalty is forfeiture of title in proceedings by the State. Take the case of a Japanese alien. If land is deeded to him after this act went into effect a deed by him is a strict fulfillment of the object of the law. There is no penalty imposed upon one who conveys to him. If you take a mortgage on his land the only risk you run is in having it paid before maturity upon forfeiture to the State. If you foreclose you have compelled the alien to comply with the law. Manifestly it was

not the intent of the legislature to impose loss upon its own citizens as would happen if the mortgage became void on forfeiture. There is no means of knowing whether these people with Chinese or Japanese names be alien or not. If the mortgagee were obliged to secure absolute proof that his mortgagor was a citizen of the United States before he could safely loan him money one could not safely loan to any one. John Smith may be a citizen of Japan, while Sam Sing may be a native born Californian. Granting that the identity [illegible] established to the satisfaction [illegible]es of the original mortgagee [illegible] the means of securing it, and [illegible]d. The question has not been [illegible]t of authority in other juris- [illegible] case of such forfeitures, the

[illegible]bility are unable to make a [illegible]grantees. The capacity of a [illegible]rantor. Infants and persons [illegible]es. It is not essential that [illegible]e date if given is **prima facie** [illegible]eful conveyancer will in the

[illegible]by the same name by which [illegible]ed run to George Johnston, [illegible]hnson, the deed should run [illegible]nder the name of George **prima facie** the identity of

[illegible]at any person in whom the [illegible] shall afterwards from any [illegible]must, in any conveyance of [illegible] name by which he or she [illegible]prehend that this provision [illegible] the name of which had been [illegible]roperty. Certainly it would [illegible] Code rule. This statute has [illegible], been construed by the Su- [illegible]hat it would be held that the [illegible]uld not render the deed void, [illegible] name which governs in law. At best the statute operates to change the rules of evidence only. The statement as to change of name is but **prima facie** evidence of the true fact.

One may acquire title by the name of "John Jones" and convey by the name of "John Smith," and if the grantee in one deed be

Meanwhile America's Envoy is in Penitentiary.

(Continued from First Page.)

that the Mexican Cabinet had the note under consideration Friday and that Gov. Cabrera of Puebla was called in from Puebla for report."

EXPECT A REFUSAL.

A dispatch bearing on the Jenkins case was received yesterday at the Mexican Embassy and it was assumed that this was Mexico's reply. While there has been no indication as to Mexico's attitude, a refusal to release the consular agent would not come as a surprise.

The American demand was delivered to the Mexican Foreign Office last Wednesday, but as late as last Friday, Jenkins still was held at Puebla and so far as the State Department has been advised, he has not been released.

LANSING DOES NOT ACT.

[EXCLUSIVE DISPATCH.]

WASHINGTON, Nov. 24. — The State Department received no information today as to when an answer might be expected from Mexico.

Although Secretary of State Lansing had admitted that today would be regarded as the end of the reasonable time to be allowed Carranza to comply with the American demand, there was no sign of the administration fulfilling its threat to take aggressive action against the Mexican government. If no reply is forthcoming tomorrow morning the steps to be taken to bring Carranza to time will be considered by the Cabinet, over which Secretary Lansing will preside.

wise if it appear from the record, we will say, in proceedings wherein "A" was adjudged to be insane and committed, and it appear from the proceedings that he was insane at the time he made his deed this fact is enough to give notice to any subsequent grantee that "A" has a right to rescind upon restoration to capacity. Again, if the record discloses that the deed was made by "A" after commitment, or after the appointment of a guardian, any grantee must be held to have notice that his deed was void and "A" can recover the land fr... If ther... purcha... any su... seekin... and n... chase... such ... learn... as he... gory ... that ... and ... influ... such ... thing ... is pr... of a... such ...

Alien... proh... a law ... in th... Acts ... conce... questi... upon ... an alie... of title... alien.

COURT SETS PRECEDENT FOR LOOSING JAPS' GRIP ON LAND.

LA Times Nov 25 1919

[BY A. P. NIGHT WIRE.]

VISALIA, Nov. 24.—The practice of Japanese in California who obtain land in the name of their children and cultivate and live on that land is a flagrant violation of the anti-alien law, according to a decision handed down here today in the Superior Court by Judges Wallace and Allen, sitting en banc.

The decision was the outcome of a petition by J. Kawahara, a Japanese, to be appointed guardian of his 4-year-old son. Two years ago Kawahara bought land in his son's name, the decision said, ostensibly for the use and benefit of the child. Desiring to place a mortgage on the land, it became necessary that the child have a guardian appointed. Kawahara's application for guardianship was denied.

SACRAMENTO, Nov. 24.—The decision today by the Tulare Superior Court en banc ruling against use of land by an alien who holds it in the name of a minor, establishes an important precedent and, if sustained, will be the means of ousting many aliens from land holdings in California, according to State Senator Inman.

Senator Inman was the author of the resolution adopted at a special legislative session, November 1, asking Gov. Stephens to call another session for Japanese exclusion legislation.

The practice of holding land through guardianship of children is general among aliens forbidden by law to hold title in their own name, Senator Inman said, and had been sanctioned by court decision in a Southern California case.

by him is a strict fulfillment of the object of the law. There is no penalty imposed upon one who conveys to him. If you take a mortgage on his land the only risk you run is in having it paid before maturity upon forfeiture to the State. If you foreclose you have compelled the alien to comply with the law. Manifestly it was

not the intent of the legislature to impose loss upon its own citizens as would happen if the mortgage became void on forfeiture. There is no means of knowing whether these people with Chinese or Japanese names be alien or not. If the mortgagee were obliged to secure absolute proof that his mortgagor was a citizen of the United States before he could safely loan him money one could not safely loan to any one. John Smith may be a citizen of Japan, while Sam Sing may be a native born Californian. Granting that the identity and citizenship of the mortgagor be established to the satisfaction of the mortgagee, successive assignees of the original mortgagee might be without such information or the means of securing it, and the mortgagee might have been misled. The question has not been decided by our courts, but in the light of authority in other jurisdictions, I am of the opinion that in case of such forfeitures, the mortgage would follow the land.

Persons who from some legal disability are unable to make a valid deed yet frequently may take as grantees. The capacity of a grantee is less restricted than that of a grantor. Infants and persons **non compos mentis** may take as grantees. It is not essential that a deed be dated to give it validity but the date if given is **prima facie** evidence of the date of delivery. A careful conveyancer will in the drafting of a deed designate the grantor by the same name by which he acquired title. For example, if the deed run to George Johnston, and the true name of the grantee be Johnson, the deed should run "George Johnson who acquired title under the name of George Johnston" or similar words to establish **prima facie** the identity of party.

It is provided by the Civil Code, that any person in whom the title to real estate may be vested who shall afterwards from any cause have his or her name changed, must, in any conveyance of said real estate so held, set forth the name by which he or she derived title to said real estate. I apprehend that this provision would be held to include a corporation the name of which had been changed after the acquisition of real property. Certainly it would be good conveyancing to follow the Code rule. This statute has not, so far as I have been able to learn, been construed by the Supreme Court. I am of the opinion that it would be held that the failure to so describe the grantee would not render the deed void, for it is the identity of person not of name which governs in law. At best the statute operates to change the rules of evidence only. The statement as to change of name is but **prima facie** evidence of the true fact.

One may acquire title by the name of "John Jones" and convey by the name of "John Smith," and if the grantee in one deed be

identical with the grantor in the other the deed is good. The burden of proof in case of attack is upon the person claiming under the deed to prove identity of person. Were the deed to follow the Code rule and describe the grantor in the latter deed as John Smith who acquired title as John Jones, the burden of proof would be upon the person attacking the conveyance to show that John Jones was not the identical person who executes the deed as John Smith.

If the grantee be single, he or she should be so described for **prima facie,** this establishes the status when he or she comes to convey. If "Sarah Scott" be described in a conveyance to her as a spinster, or a single woman, and she afterward convey as "Sarah Robbins," married, the record on its face shows the property to be her separate estate. One dealing with the property is entitled to rely upon these recitals and a careful conveyancer will insert them. The recital that the property is conveyed to a grantee as his or her separate estate is not conclusive. It simply shifts the burden of proof in case of attack. Yet if it be a fact that the consideration is paid we will say by a married woman with money received by devise from her father it is a good rule, and certainly excellent practice to recite the facts that they may be traced if necessity demands.

Where the parties act in a trust relation as trustee, guardians, executors, administrators or the like it should clearly appear that the conveyance is made to them, or by them as such. Otherwise it will be held that the deed is personal. It is often desired in the administration of estates to clear titles and to take deeds for that purpose. We will take an instance where the deceased in his lifetime has executed a contract of sale. After his death it is desired to take a deed from his vendee who wishes to surrender. It is a common mistake to make the deed to the "estate of" the deceased. Such a deed passes no title, for there is no such thing as an "estate" of a deceased person as a legal entity. The deed should run to "John Doe," we will say, "as the administrator or executor of the estate of James Roe deceased, subject to the administration of his estate," or "to the heirs or devisees of James Roe, deceased, subject to the administration of his estate."

It must be remembered that upon the death of the ancestor the title to all property owned by him at the time of his death vests instantly in his heirs or devisees, subject to administration. The object of administration being to judicially determine the identity of the heirs or devisees, and to save the rights of creditors of the deceased. The administrator has by virtue of the laws of California a qualified estate sufficient to enable him to maintain or defend actions in relation to the property, but his title is transitory, and

when distribution is made, passes automatically to the heir, or speaking in a stricter sense, dies when the administration is complete. A devise of all title may be made to an executor, but to all intents and purposes his title is that of an administrator. It is not required that he convey over to the devisee when the administration is complete.

In cases where it is desired to create a joint tenancy in the grantees the words of grant should be to them "as joint tenants with the right of survivorship." It is not necessary to add, "and not as tenants in common," for the first designation precludes the latter. The habendum should follow this exactly if used. It is not proper to say "to have and to hold to their heirs" for the estate does not pass to heirs. It is better practice to exclude the habendum, but if used, care should be taken that it is not repugnant to the granting clause.

In cases where the identity of the grantee cannot be established the deed is void. Thus a deed running to the citizens of Inglewood is void, for the identity of the persons intended as grantees could never be established. A conveyance to the "Republican Party" would be void on the same grounds. A deed to John Jones or Mary Jones is void, for it does not appear which person was intended as the grantee.

It is not necessary to state the amount of consideration in a deed. A written instrument presumes a consideration, yet it is good conveyancing in cases of gifts by deed to state the fact that the conveyance is by way of gift, that it may affirmatively appear that the property conveyed is vested in the grantee as separate estate. It is not requisite that the consideration be adequate, or, in cases of gift, valuable. Love and affection is a good consideration, as is better maintenance and support.

It must be remembered that a deed is always assailable if the property remains in the grantee and the consideration be inadequate, or there be fraud of any nature coloring the transaction between the grantor and the grantee. When the property has passed from the grantee under a fraudulent deed to an innocent purchaser for value, it is clear of any taint in his hands. The reason for this is obvious. It is not possible that one purchasing lands could know all the secret intentions and motives of the parties who preceded him in the title, nor of the actual circumstances surrounding the various transactions. There could never be safety in the ownership of real property if every purchaser should be held to have knowledge of every circumstance and fact which governed every transaction relating to it. Hence the law says that one who has not actual notice of infirmities or that constructive notice

which is imputed to him by the public records is protected when he has in good faith parted with value in exchange for the land.

The subjects of descriptions of the property conveyed and of conditions and covenants in deeds will be considered under separate heads. We will pass to the other formal parts of the deed.

Under the California system of conveyancing the habendum or the "to have and to hold" clause has no place in a deed. It should not be used at all, as many times it leads to confusion. The simple words "grant" or "quit claim" are sufficient. In using forms containing this clause care should be exercised to insert no words repugnant to the granting clause. The safest course is to exclude the habendum clause altogether. It is unnecessary and dangerous. If it be desired to disclose the sex of the grantee, and it is good practice so to do, let the deed run to the grantee, his or her heirs.

The signature to the deed should be identical with the description of the grantor, yet this is not vitally important. Where the deed describes the grantor as "George Jones," the signature may be "Geo. Jones" or "G. Jones," so long as the identity of the party is otherwise sufficiently established. The signature may be written by one other than the grantor if it be done at his instance and request. A signature by mark or any character is sufficient. It is provided by Sec. 14 of the Civil Code that signature or subscription includes mark when the person executing cannot write; his name being written near it by a person who writes his own name as a witness; provided, that when a signature is by mark, it must, in order that the same may be acknowledged, or may serve as the signature to any sworn statement, be witnessed by two persons who must subscribe their own names as witnesses thereto. I recommend the following form for use in such cases.

"John Smith, being unable to write, I have subscribed his name hereto, and the said John Smith hereto affixed his mark in the presence of the witnesses who subscribe their names below.

(Signed) Abel Jones.

Witnesses:

William Adams.

Abel Jones.

A deed not executed with such formalities is not void, but such attestation is **prima facie** evidence of the fact of execution. Where the deed is by a corporation such a signature as "William Evans, President, etc." is insufficient. It must be in the name of the corporation by William Evans, President, etc. It is essential that the corporate seal be attached if the corporation has adopted a seal. If they have not done so the instrument should state that fact. The execution by an attorney in fact must be in the name of the

principal, otherwise it is the personal deed of the attorney. If there are two grantors in a deed, one of whom acts as attorney in fact for the other, such attorney must sign his name twice; once as attorney in fact for the grantor for whom he acts, and once for himself. It is not necessary under California law to affix a private seal, nor are witnesses necessary, except in cases where the grantor signs by mark. It is often desirable, however, to secure a witness, for proof of the execution may be made by a subscribing witness, and this is convenient many times when it is difficult to secure the acknowledgement of the grantor.

We now come to consider the subject of delivery of a deed; a very important subject as you shall see. Before a deed can operate at all it must be delivered. This delivery is absolutely essential to a transfer of the land. Although the deed in all other respects has been properly executed, it is a nullity unless a legal delivery is made. It is not essential that an actual physical transfer of the instrument be made. As said by Devlin, "The act of delivery is not necessarily a transfer of the possession of the instrument to the grantee and an acceptance by him, but it is the act of the grantor indicated either by acts or words, or both, which shows an intention on his part to perfect the transaction by a surrender of the instrument to the grantee, or some third person for his use and benefit. The whole object of a delivery is to indicate an intent upon the part of the grantor to give effect to the instrument. It is not necessary to pursue any particular course to effect a valid delivery of a deed. It is sufficient that a grantor intends when executing a deed to be understood as delivering it. Hence a grantor is not permitted to say that a deed is inoperative for want of a formal delivery where he has induced the grantee to believe in its execution and allows the grantee to act under that belief."

It is a question purely of intent to deliver and no manual delivery is operative unless accompanied by an intent to deliver. It is a favorite custom where a husband and wife own a certain piece of land as tenants in common to execute deeds simultaneously, one to the other, with the understanding that upon the death of either grantor, his or her deed shall be recorded to vest record title in the surviving grantee. This device is futile, for there is no valid delivery. There is no intent to deliver presently and unconditionally and such deeds are void as against an attacking heir or creditor.

A valid delivery of a deed may be made to take effect in possession after the death of a grantor, but there is no such thing as an estate to begin in the future. The possession and enjoyment may be postponed, but a **present** interest must pass. Such deliveries must be absolute and unconditional with a **bona fide** intent to pass

the title at once, but as said, the possession may be postponed. Such a deed may be delivered to a third person to be delivered to the grantee upon the death of the grantor, but the original delivery must be absolute and unconditional. Such a deed has the effect to pass a present title to the grantee to be possessed by him on the death of his grantor, and there is left a life estate in the grantor. Any conditions attached to the first delivery which imply a want of intent to make absolute delivery are sufficient to render the deed void. For example, "A" executes a deed to "B" and delivers it to "C" with instructions to deliver at a certain date or upon the death of "A" "provided I do not sooner demand return of the deed" or "provided I do not sell the land in the meantime," or "provided "B" lives" or the like. Here is an implication that "A" did not intend an absolute and unconditional delivery and no title passes by the deed. The subject of delivery to third persons for the benefit of the grantee will be more fully discussed under the head of "Escrows." I wish to impress this fact however upon your minds at this time that no deed is operative which is not legally delivered, and this, in short, means a full and absolute intent upon the part of the grantor that his deed shall be operative. A thousand different cases arise in which circumstances differ. The test is in every case "did the grantor intend to deliver, and did he surrender dominion over the instrument?"

Deeds are always effective against the parties to them and all having actual notice of them. To impart constructive notice of their contents the law requires that they be acknowledged in statutory form and recorded. They thus impart knowledge, if they be properly acknowledged and recorded, whether one subsequently dealing with the property ever sees them or not. Possession is the highest form of notice and one dealing with property must always enquire into the rights of parties in possession, whether the record discloses any interest, or is silent. One in possession either by himself or tenant is not required to record his deed or contract of purchase. His physical possession is the best notice to the world of his right to occupy the land.

Deeds not properly executed or acknowledged do not impart notice to one who has no actual knowledge of them. Acts are passed from time to time to cure such defects in the record. Thus they provide that in cases where instruments which, by reason of defect in execution or acknowledgement, or which were not acknowledged at all, have been recorded in the proper books of record before a certain date, shall be deemed to impart knowledge of their contents after that date, irrespective of the defect. These acts always save the rights of third parties, however. Thus if "A"

convey to "B," and there is a defect in execution or acknowledgement, and the deed be recorded in the proper book of record, and before the taking effect of the curative act, "A" convey the same land to "C," who has no actual knowledge of the prior conveyance to "B," the curative act does not operate to validate the deed to "B" as against "C." If "C," in examining the record, finds the deed to "B," and ascertains that it is not entitled to record, he cannot rely upon this and deal with "A," claiming to be an innocent purchaser. His actual knowledge of the attempted conveyance to "B" thus gained is sufficient to put him upon enquiry, as much so as if the deed to "B" had been entitled to record. Actual knowledge of any such conveyance derived from any source is enough to bind "C" to all he might have learned had he pursued his enquiry.

As the forms of acknowledgment are frequently changed it is enough to say that these forms as prescribed by the codes must be constantly scanned in the preparations of deeds and in their examination. Remember also that each state has its own requirements. In certifying acknowledgment of deeds to be used in another state, investigation should be made of the laws of the particular states that parties may not suffer loss or inconvenience.

Another point which will be dealt with more largely when we reach the subject of trusts. It is a common practice to take a deed to a grantee as "trustee" without further designation and without attempting to disclose the object of the trust. The question arises as to what notice is imparted to a purchaser from the person so described by such nomenclature, and what enquiry should be made as to possible interests of other persons. Very frequently deeds are so taken under the mistaken impression that the property is thus protected from creditors. In such cases, the word "trustee" may be considered merely as descriptive, a sort of identification of the grantee. He may be trustee of a church or the like. Although it is not likely that he would so describe himself. Such a deed wherein the word may be considered only as descriptive, the full title, legal and equitable, is vested in the grantee. It may be that he holds title as trustee for another, in which case it is a resulting trust, and while he is in fact a trustee, he has no powers except to convey to the one who has paid the consideration. He holds the bare legal title only, the one who paid the consideration is the equitable owner. One who takes a deed from the trustee gains but the same bare legal title and holds for the equitable owner. It may be disclosed that there was an express trust created by another instrument in writing contemporaneous with the deed, and if so, the grantee's powers are measured by that instrument, and an intending purchaser or encumbrancer must inspect that document.

In cases where such deeds occur in a chain of title and the title has passed from the trustee long since, and all parties appear to have acquiesced in the transaction, and there be nothing indicative of a possible trust, I judge it a safe rule to ignore the term and assume that the full title passed. Not so, however, when the transaction is a recent one, or where such a deed is presented. You are not safe in ignoring the word "trustee" when the person who offers to sell to you exhibits a title in himself as trustee. You are distinctly put upon enquiry as to possible rights of others, and if you do not investigate, you purchase at your peril. Do not make or take such deeds. They but lead to confusion and doubt.

Remember these points: Do not describe yourself in your deed as trustee unless you be such under a valid express trust. Do not describe your grantee as trustee, unless he be such in fact, and then define the trust. If he insist, persuade him from it by pointing out the difficulties he may experience when he comes to sell or mortgage.

Remember in buying or in loaning money, you must know that the one with whom you are dealing is of full age and capable of contracting. If the property be homestead you must know that the parties are in fact husband and wife. You must know that the party from whom you are buying is the identical person described in the deed under which he claims. These things are not disclosed by the records and hence are not in the ken of the title companies. You cannot rely upon your guaranty of title as to these things. You may rely upon your guaranty up to the time your dealings begin with individuals.

Always and in every instance require an examination of the title for all matters of record are notice to you whether you know them or not.

III.

Covenants, Conditions and Restrictions in Deeds

This subject is a very wide one, and I cannot hope to do more than treat of a few of its more salient features. I shall aim to discuss the important points only from the viewpoint of a grantee in a deed, or of one who examines the deed for him.

The law imposes upon the grantor certain liabilities by his very act of transfer. These liabilities are fixed by Statute in this State. Section 1113 of the Civil Code reads:

"From the use of the word 'grant' in any conveyance by which an estate of inheritance or fee simple is to be passed, the following covenants and none other, on the part of the grantor for himself and his heirs to the grantee, his heirs and assigns are implied unless restrained by express terms contained in such conveyance.

"1. That previous to the time of the execution of such conveyance the grantor has not conveyed the same estate, or any right, title or interest therein to any person other than the grantee;

"2. That such estate is at the time of the execution of such conveyance free from encumbrances done, made or suffered by the grantor or any person claiming under him. Such covenants may be sued upon in the same manner as if they had been expressly inserted in the conveyance."

These implied covenants may, of course, be nullified by proper recitals in the conveyances, and any further covenants as to general warranty as to all persons or claims of all persons, and against all encumbrances at any time, whether made or suffered by the grantor, may be inserted and be binding upon the grantor and his heirs. As all of such covenants do not bind the land but create a personal liability only, it is important for one dealing with the land to know what these covenants stand for and mean.

It will be observed that under the form of Grant Deed in general use in California there is no covenant of warranty on the part of the grantor that he is the owner of the property. He only covenants by the word "grant" that he has not conveyed the same property or any right, title or interest therein previous to his conveyance to any person other than the grantee in his deed. This and the covenant against encumbrances are personal covenants and may

be sued upon by the grantee or his heirs. It would appear, therefore, that one may make a deed of grant who is not the owner of the property, and the law does not impose upon him any liability for warranty of title. Again, it must be strictly observed that his implied warranty under the Statute by such a deed applies only to such encumbrances or liens made or suffered by him. His warranty does not extend to any lien or encumbrance which may have been made or suffered before he acquired the title. Thus, if "A" acquire title from "B" in May of a certain year, the State and County taxes which are declared by law a lien upon the lands from and after the first Monday in March are not made or suffered by "A," for he did not own the title on the first Monday of March. These taxes subsequently are levied. This has no bearing upon "A's" liability for the taxes were a lien before he acquired the title; therefore, when "A" deeds to "B" we will say in September of the same year, he is not liable under his warranty for those taxes. A mortgage is made upon the premises by "A's" predecessor in interest. He conveys the title to "B" and makes no mention of this encumbrance. He is not liable upon his warranty for the encumbrance was not made or suffered by him.

All this leads to this statement, that in dealing with property the purchaser is not entitled in law to rely upon the deed of his grantor. He must, if he will be protected, cause an examination to be made of the title to ascertain whether or not his grantor is in fact the owner of the property, and whether, as a matter of fact it be subject to lien or incumbrance; otherwise he deals at his peril, for the law does not impose upon the grantor in the absence of any special covenants of warranty, a liability for failure of title or cloud of title under the above circumstances. It will thus be seen how important it is that an examination of the title must be made to ascertain the true state of facts. If an examination be made and it be shown by the record that "A" is the owner of record and that there are no liens or incumbrances existent, "A's" Grant Deed is as of high value as if he had in terms warranted against every possible defect; otherwise, as I have stated, any assurances made by the grantor outside of his deed are of no avail against him if his title be in fact subject to matters for which the law does not hold him personally responsible under his warranty.

As I have stated before, these Statutory covenants that land is free from encumbrance, are personal covenants and do not run with the land. The term "encumbrances" includes taxes, assessments, and all liens upon real property, but these are not the only encumbrances to be considered. While they include such matters, there are other matters which may become encumbrances; for instance,

is an encumbrance upon the land; likewise a dam, a foot path or any right lodging in a third person. Building restrictions or other covenants as to occupancy or use are encumbrances, and one may refuse a deed where his contract calls for the delivery of a deed free and clear of encumbrances if any such matters appear in the chain of title. A lien is a charge imposed in some mode (other than by a transfer in trust) upon specific property by which it is made security for the performance of an act. It must be borne in mind that a conveyance in trust does not create a lien. It passes a title. This will be further distinguished in our discussion of Mortgages and Trust Deeds.

Devlin in defining an encumbrance says:

"It is sometimes extremely difficult to determine whether or not a particular right in another is an encumbrance within the meaning of the covenant against encumbrances. This difficulty arises from the fact that the word 'encumbrance' does not admit of a general and at the same time an accurate definition." Thus a lease outstanding might add greatly to the value of the property from an investment standpoint, but if the purchaser desired immediate possession, the existence of the lease might detract from its market value, and the lease might under such circumstances be deemed an encumbrance."

Bouvier defines an encumbrance as: "Any right to or interest in land which may subsist in third persons to the diminution of the value of the estate of the tenant, but consistently with the passage of the fee." In other words, if the third person had any vested right or title in the land, it would not be considered an encumbrance but a title, but if a third person is possessed of some right or interest in the land which does not prevent a passage of a full title in fee simple, his right or interest is an encumbrance. The circumstances of each particular case must govern, and no general rule can be laid down to govern absolutely in such cases.

Covenants are of two characters. Covenants running with the land, which perpetually bind the land to their observance, and personal covenants which are enforceable only as between the parties and not as to the land. What are covenants running with the land? The simple assertion that certain covenants expressed shall run with the land is not sufficient unless the subject matter treated of is such as the law allows to be so dealt with.

The only covenants which run with the land in this State are those specified in the Code (Section 1461 Civil Code.) Section 1460 of the Civil Code is as follows:

"Certain covenants contained in grants of estate in real property are appurtenant to such estates and pass with them, so as to

bind the assigns of the covenantor and to vest in the assigns of the covenantee, in the same manner as if they had personally entered into them. Such covenants are said to run with the land."

Section 1462 of the Civil Code reads:

"Every covenant contained in a grant of an estate in real property, which is made for the direct benefit of the property or some part of it then in existence, runs with the land." But the property to be benefited is the estate granted and this must be borne in mind. These so termed real covenants run with the land, inuring to the benefit of or becoming binding upon subsequent grantees. Personal covenants are binding only upon the personal covenantor and his personal representatives. A real covenant, meaning by that a covenant which runs with the land, must have relation to the interest of estate granted, and the act to be done must concern the interest created or conveyed, and by our Statutes must be a benefit to the land conveyed, thus a covenant restricting the use of the land is not a real covenant. It must be borne in mind, however, that a personal covenant will be enforced by a Court of Equity against a subsequent grantee with notice of the covenant, but this is only in particular cases, as we shall presently see. To create a covenant running with the land, there must be a privity of estate or mutuality of benefit; that is to say, the parties must be in such a relation, one to the other, that each is under some obligation to the other, or, that each is to receive some benefit from the covenant. And it has been held in this State that a subsequent grantee is not bound to look beyond the deed containing the covenant for evidence of this.

In Los Angeles, etc., vs. Muir, (136 Cal. 36) the Court lays down this rule: "In the absence of any words in the deed or any reference to a plan showing a general scheme of improvement, the grantee will take without notice, express or constructive, that the restriction inserted in the deed was for the benefit of the adjoining estate." But as I shall show later, this case cannot be taken alone as authority. There are other elements entering into a logical discussion of this which were not in the purview of the Court. This rule is again laid down in Berryman vs. Hotel Savoy Co., (160 Cal. 569.)

In a deed from Kinney and Dudley, it was covenanted that any building erected on the granted premises should not be nearer than 12 feet from a certain line. Subsequently Kinney and Dudley with the obvious purpose of clearing the title, quit-claimed to the then owners any interest they had for the purpose of removing the restriction. A grantee from Kinney and Dudley owning the adjoining lot sought to enjoin a violation of the agreement on the ground that the restriction was created for the benefit of the lands of Kin-

Restriction abandoned — Bryant v. Whiting, — Cal. —, 56 Cal Dec. 142 (8/1/18)

ney and Dudley, and that this benefit inured to every other grantee; that the covenant created reciprocal obligations enforceable in equity either as covenants that run with the land or as personal covenants with which a Court of Equity will compel compliance by persons taking the respective parcels with due notice of the mutual agreements. This contention was not sustained, the Court pointing out that there was no mention of any other property of the grantors in their deeds; nothing in the deeds to show that they had any interest in any property other than that mentioned in the deed. The Court said: "Examining the words of the covenant itself, we cannot see that it creates an easement running with plaintiff's land. It purports to be a covenant running with the land conveyed, and there is nothing in the deed itself to show that the grantors owned another foot of land in that vicinity. Defendant, therefore, as a subsequent purchaser of the land, could not be charged with knowledge **derived from the record** that Kinney and Dudley owned other property to be benefited. (The bold type is mine). It will be observed that the deed declared in terms that the covenant was one running with the land. It was held that it was not such, even though so termed. It will also be observed that the evidence adduced showed no knowledge of defendant of possible benefits to other lands of covenantee, that is to say, Kinney and Dudley, from matters **outside the record.** A covenant running with the land cannot be created by mere agreement of parties, if there be no privity of estate or mutuality of interest. As pointed out, a Court of Equity will enforce a purely personal covenant as against subsequent grantees as in the case of real covenants if the subsequent grantee has notice of the covenant.

The Court in the Muir case above cited used this language: "That there are personal covenants enforceable in equity against the grantee of the covenantor (that is to say, the grantee of the first grantee) is conceded; but the proposition is far from being applicable in all cases, for if it were, it would result that all purely personal covenants in any manner relating to land would have the same effect as those which do run with the land. The vendor and purchaser of real estate have the undoubted right to bestow such benefits and impose such burdens and restrictions upon the land sold and that retained by the seller as they see proper, unless some wrong or injury thereby result to third parties or it be against public policy."

The Court refused to enforce the personal covenant against a subsequent grantee with notice **by record** on the ground that the grantor, if it was its intention to bind subsequent grantees could have inserted a condition subsequent, the violation of which would

have involved a forfeiture. It did not do this, but inserted a purely personal covenant. In this case it does not appear that defendant had **actual** notice outside of the record of a general plan of improvement by which he might have been bound.

Here it is proper to distinguish in your minds the difference between a covenant and a condition subsequent. A covenant is an agreement to do or not to do certain things, while a condition subsequent is a grant upon condition that if certain things are done or not done, the grantor has a reversion and may enforce a forfeiture. In the first case, he does not reserve to himself any interest or title, relying only upon the agreement. In the second place, in a condition subsequent he retains a certain estate in himself which may be under proper procedure ripened into a full estate by forfeiture. This distinction must be clearly borne in mind, as all of the law bearing upon such matters hinges upon the fact of whether the covenant be in the nature of a personal agreement, or a condition which leaves in the grantor a certain title. A covenant directly and fundamentally concerning land or its use may be enforced in equity, irrespective of the question as to whether the covenant is one which runs with the land. The equitable doctrine is that a covenant between a vendor and a purchaser on the sale of the land that the purchaser and his assigns shall use or abstain from using the land in a particular way, will be enforced in equity against all subsequent purchasers with notice, and this notice, as I take it, means either constructive notice by the record, or actual notice outside of it. Under this rule, covenants are sustained and enforced against assignees with notice, stipulating for a particular mode of improvement, occupation or use of lands, and it is especially applicable to restrictive covenants; thus, covenants in respect to the mode of building or occupying parts of a large tract; certain stipulations made by the owners as to the use of ways; for light and air, etc.; reserving premises exclusively for dwelling houses; prescribing manner of improvements; not to carry on particular trades or business, as for instance, not to use premises for the sale of intoxicating liquors, for an inn, tannery, gas house, etc. Such stipulations or restrictions which are sometimes called equitable easements, servitudes or amenities, are enforced by injunction irrespective of the question of privity of estate, or the nature of the tenure. Thus they can be enforced by injunction whether the covenant be a purely personal one, or a condition subsequent, but they must be such as relate to or concern the use or enjoyment of the land. It is not enough that the covenant affects the use of the land or the enjoyment of an easement thereon, or the value or profitableness of the use thereof in a collateral way, but they must primarily and funda-

mentally relate to the use or enjoyment of the land. It is not necessary to give notice to a subsequent grantee of any such covenant or condition subsequent that reference be made in the deed to him of such. The covenant as originally created is sufficient, and if one finds it in the chain of title it is as effective against him or in his favor as if it appeared in his own deed.

Personal covenants will be enforced against any grantee in the chain who has notice, actual or constructive, only when it can be ascertained from the language of the deed itself and from the surrounding circumstances that the intent of the parties was to create a covenant affecting **directly and fundamentally** the use or occupancy of the land, and the language must be apt and clearly expressed to produce this result, or the facts and circumstances surrounding the transaction must clearly point to such intent. Furthermore, the covenant must be equitable. There must be a sound reason for its enforcement. Mere whims of a grantor will not be regarded. When he has delivered his deed there is no privity of estate between him and his grantee even when the deed contains a covenant. He has no estate left in him as he would have when he makes a deed upon a valid condition. If not a privity of estate, there must at least, I apprehend, be a mutuality of interest and benefit before the purely personal covenant will be enforced against subsequent grantees. I am not permitted when I have parted with my estate, to impose upon my successors in interest for all time to come, restrictions as to the use of the property simply because I have once been the owner of it, and through some fancy or whim desire that it be put only to certain uses. Primarily, it is against public policy that the use of land be unnecessarily restricted; secondarily, the law declares I have no further interest in the estate, and therefore it can be no concern of mine to what use it be devoted, unless I be peculiarly affected by the subsequent use. And then I must show a reason for imposing the restrictions which will stand in equity.

A few examples of purely personal covenants will not be amiss. "A" conveys to "B" with a covenant that "B" will support "A" during his lifetime. Here is an agreement binding upon "B," but there is nothing to prevent "B" from conveying the property and his grantee will not be bound, for the covenant is not such as goes to the use, occupancy or enjoyment of the estate. So long as "B" retains the estate, "A" may sue to recover the lands upon breach of the covenant. No so when "B" has conveyed. "A" must then look to the proceeds of the sale and not to the land.

"A" conveys to "B," his son, upon the covenant that "B" shall continue a member of a certain church, or adhere to its faith. "B's" grantee may ignore this agreement.

I deed land to a corporation, "to be used for church purposes," or upon the covenant, "that a schoolhouse be erected thereon," or "that a railroad shall be constructed thereon in two years." These covenants are not binding upon subsequent grantees and the title is cleared of them when my grantee conveys. It will be shown later that by a valid condition subsequent inserted in my deed I can make these agreements binding upon all, for we shall presently see that there is a great difference between covenants and conditions. One reading the deed must determine if possible whether a covenant is a purely personal one or one running with the land. If it be determined from the language of the deed or the surrounding circumstances that it was the intent of the parties to create a covenant having direct and immediate reference to the land, relating to the mode of occupying and enjoying the same beneficial to the grantor, and is, in truth, inherent in and attached to the land itself, then it must be regarded no matter in whose hands the land may be. If it be desired to clear the title, a deed effective for the purpose must be secured from the grantor, his heirs or assigns, of the particular right. If the covenant has none of the above essentials, it may be disregarded entirely after the land has passed from the original grantee, or his heirs.

Section 1468 of the Civil Code enacted in 1905, is as follows:

"A covenant made by the owner of land with the owner of other land to do or refrain from doing some act on his own land, which doing or refraining is expressed to be for the benefit of the land of the covenantee, and which is made by the covenantor expressly for his assigns, or to the assigns of the covenantee, runs with both of such parcels of land."

This in simple language means that two owners of separate tracts may make contracts each with the other to do or not to do some particular act on their own lands, and if in the contract it is expressed to be for the mutual benefit of the parties, their heirs or assigns, a covenant is then made which runs with both parcels of land; therefore, where "A" conveys to "B" a certain lot, making it subject to certain restrictions, and in the same conveyance agrees that he will so use his own land or impose such restrictions upon other lands in his tract, the land remaining in "A" after his conveyance to "B" is clearly bound with that which he has conveyed to "B," and subsequent purchasers from "A" of other lots in his tract take with this notice. The rule was, before the adoption of this section, that covenants running with the land could be created only by grant. Although this section has not so far as I have been able to discover been construed by our Supreme Court, it would appear that real covenants running with the land and binding upon

all parties at all times, can, since this section went into effect, be created in this State by contract, either in deeds or executory contracts. So, if it be found in any deed that the grantor has in appropriate words bound his remaining lands in the same respect as he binds the property conveyed by the deed, or in any executory contract between parties in which the lands of each are bound by reciprocal covenants, then one dealing with the grantor in subsequent deeds of other lands affected must take subject to such covenant, whether it be contained in the deed to him or not. One instance will suffice for illustration. "A" conveys to "B" with a covenant that "B" shall not erect a building on the premises conveyed to cost less than $1,000.00, and the further covenant that "A" will not build any house on any other lot in the same tract to cost less than $1,000.00, and that he will impose similar conditions in conveyance of other lots in the same tract. Here "A" has bound himself equally with "B." To clear "A's" title it will require a deed from "B," his heirs or assigns, as the covenants are reciprocal. "B" has the same interest in enforcing the covenant in his favor as has "A" in enforcing his covenant in his favor. Not many cases of this kind arise as it is the common practice, at least in this community, to impose the covenants upon the lands of the grantee only. To give the grantee protection against violation of verbal agreements, inducements or representations, a careful conveyancer will in the preparation of such deeds insert reciprocal covenants.

We now come to consider conditions imposed by a grantor in his conveyance which may or may not run with the land, whereby a conditional estate is granted. In cases where a valid condition is imposed in appropriate and apt terms, an interest is left in the grantor, transmissible to his heirs or assigns, a sort of estate as there is a possibility of reversion. This is not true when the matter is a pure covenant and not a condition, as for instance: Where a deed is given containing this clause: "This deed is given by the parties of the first part and accepted by the second party upon the express agreement of the second party to build or cause to be built upon said premises within six months from date a house, etc.," this was held to be a personal covenant and a forfeiture of the title was denied. (Hawley vs. Kafitz, 148 Cal. 393.) The deed contained a provision that the land should be used as a street and not as a building lot. This was held to be a covenant only, and the title did not revert on the breach of the covenant. (Weller vs. Brown, 160 Cal. 518.)

A covenant between the grantor and the grantees in a deed which merely imposes a burden of restrictions upon the grantee and does not reserve or create any interest in the grantor by

conditions subsequent in the grant, and does not purport to inure to the benefit of an assignee of the grantor or to bind the assigns of the grantee, is personal in its nature and does not run with the land or charge an assignee of the grantee with such burden. Thus, a covenant in a deed to a yacht club that "in consideration of the conveyance the land should not be used for any purposes other than for hotel or lodging house or club purposes" is a personal covenant which binds the yacht club only during its tenure and is not binding upon its grantee.

Any covenant for the forfeiture of title in satisfaction of a debt is void. Thus, if I make my deed to "A," stating in it that it is a condition of the deed that it shall be operative only in case that "B" fails to pay me $500.00 within 60 days, this condition is void. The bare legal title will pass, but the instrument is a mortgage. In a broad sense and broadly speaking, a condition is of a higher order than a personal covenant. It will be observed that the Statute limiting covenants which may run with the land to such covenants as benefit the land conveyed does not apply to conditional estates. Most frequently the language used by the parties in framing the condition imports an intention to create more than a personal covenant. Difficulty is met in distinguishing in many cases between a purely personal covenant and a covenant which binds the land, owing to faulty expression. It is a cardinal rule that to hold an estate to be upon condition, the intent must be expressed in clear and apt language, as Courts are hostile to forfeitures. It would serve no good end to cite instances, as each particular case must be decided in the light of its own peculiar circumstances. It is a safe guiding rule that it must appear from the language used in the conveyance clearly and beyond question that the parties intended to create a conditional estate involving the right of forfeiture. In Quatman vs. McCray, (128 Cal. 285), forfeiture was declared for the breach of the following condition or covenant, whichever it might be deemed to be, although it is my best judgment that the language used created a covenant and not a condition:

"And this conveyance is made upon the following express condition, viz: That any building to be used as a dwelling house erected upon these premises within two years, shall cost not less than $1,200.00, and shall be located not less than 20 feet from the front line of said lot."

The language of the deed did not purport to bind assigns, and there is no provision of forfeiture. While it was termed a condition this does not necessarily make it such. Two things must be considered here to clearly understand the judgment. The action was between the original parties to the deed and the decision does

not go to the point of construing the language of the deed either as a condition or as a personal covenant. The evidence was only as to the breach of the covenant and the point was not raised as to whether it was purely personal or one running with the land. This case has been often referred to as proving that a forfeiture can be enforced upon a purely personal covenant, but I do not consider it of weighty authority for the reason spoken of, that the evidence was only as to the breach of the covenant and no attempt was made to avoid the forfeiture on any other grounds. Forfeitures are not favored in law and the Courts will not declare an estate to be upon condition unless the intent of the parties is too clear and convincing for other construction. Forfeitures, as such, are never enforced if they are couched in ambiguous terms. Conditions involving forfeitures are construed strictly against the parties for whose benefit they are created, and are construed with the utmost jealousy to prevent restraint going beyond expressed stipulations, and the intention of the parties as shown by the instrument must be looked at to determine the nature of the condition, and no other evidence can be taken. It must appear from the language of the deed itself that it was the clear intent to make a condition whereby the title could be forfeited, and not a personal covenant. Language which merely describes the use to which property is to be devoted does not create a condition such as "to be used for church purposes" and the like, unless this be made upon the condition that the property be used for such purposes, and if not so used that the title shall revert to the grantor, his heirs and assigns.

There is a distinction between estates made upon condition and conditional limitations of estates which must be borne in mind. In the former case where an estate is made upon a valid condition and the right of reversion or forfeiture is retained, the whole estate does not pass out of the grantor. He reserves enough to enforce the condition and recover his estate. There is left to him the possibility of reverter to himself or his heirs. This is a sort of an estate in the land and descends to his heirs or is assignable to him. This right of reverter lies dormant and comes into life upon breach of the condition whereby the owner of the right may enforce the penalty. It does not restrain or interfere with the alienation of the grantee's title. **The right** considered as such is of as high order as the grantee's right to the land. A purely conditional estate then is one where the right of reversion is in the grantor, his heirs or assigns. This right **cannot be saved to a stranger by the same instrument which creates** the condition. Additional limitations in the conveyance whereby upon breach an estate arises and is vested in a third person upon a contingency at a future uncertain period

are void. Nothing is left in the grantor. His whole estate passes by his conveyance, and this being so, the additional limitation is void for uncertainty. This sort of an attempted limitation over or conveyance over must not be confounded wth those which are to take effect upon a date certain or the certain happening of an event.

It is lawful to convey the estate over to a third person upon the certain termination of a prior estate. Any attempted creation of a condition then which depends upon the happenings of some event at an uncertain time, or by which it is attemped to restrain the power of alienation beyond the lives of persons in being at the date of its creation is void and may be ignored. For instance: Should a deed be made to the trustees of a certain church upon the express condition that the minister should constantly reside and dwell on the property at all times, and in case he should not do so that the grant should be void and of no force, and that the land should then revert to the grantor, and by the same instrument he gives the same to John Smith and his heirs forever, this condition is void and may be ignored, the full title vesting in the trustees of the church, clear of the condition. This is upon the theory that the entire estate by the same deed passed out of the grantor forever. The first estate granted to the trustees of the church vests immediately, but the expectant interests of John Smith does not take effect until the happening of the contingency provided, but both owe their existence to the same grant or gift and being an ultimate disposition of the entire fee as well after as before the breach of conditions, there is nothing left in the grantee or his heirs.

The right or possibility of reverter which on creation of an estate in fee on condition merely, would remain in him is given over by the same instrument to Smith, and this is to take effect on the breach of the condition. The material difference, therefore, between an estate in fee on condition and on conditional limitation is briefly this: That the former leaves in the grantor a vested right which by its very nature is reserved to him as a present existing interest descendable to his heirs, while the latter passes the whole interest of the grantor at once and creates an estate to arise and vest in a third person upon contingency at a future and uncertain period of time. This possibility of reverter in an estate upon condition is a vested interest in real property, and is capable at all times of being released to the person holding the estate on condition, and if so released conveys an absolute title thereto in him. The grant of a fee on condition even though it leave an estate in the grantor, does not therefore fetter and tie up estates so as to prevent their alienation, and thus contravene the policy of the law which aims to secure the free and unembarrassed disposition of real property.

It is otherwise with grants with a limitation over upon a condition or event of an uncertain or indeterminate nature. The grant over to Smith in the case above cited, depending upon a condition or an event which may never happen, passes no vested interest or estate. It is impossible to ascertain in whom the ultimate right of the estate may vest or whether it will ever vest at all, and therefore no conveyance or mode of alienation can pass an absolute title, because it is wholly uncertain in whom the title will vest on the happening of the event or breach of the condition upon which the ulterior grant is to take effect. The true test by which to ascertain whether the grant over is void for remoteness is very simple. It does not depend upon the character or nature of the contingency, or event upon which it is to take effect. These may be varied to any extent, but it turns on the single question whether the prescribed contingency or event may not arise until after the time allowed by law within which the grant over may take effect, that is to say, within the lives of those in being at the time of its creation.

Section 716 of the Civil Code is to the effect that every future interest **is void in its creation** which by any possibility may suspend the absolute power of alienation for a longer period than is prescribed by the chapter; such power of alienation is suspended when there are no persons in being by whom an absolute interest can be conveyed.

Section 715 of the Civil Code reads: "The absolute power of alienation cannot be suspended by any limitation or condition whatever for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition except in the single case mentioned in Section 772."

Section 772 of the Civil Code provides that a contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited die under the age of 21 years, or upon any other contingency by which the estates of such persons may be determined before they attain majority. Conditional limitations therefore as defined above, or conditions which **by any** possibility may suspend the power of alienation beyond the period permitted by the Statute, may be ignored and no steps are necessary to clear the title.

Conditions which may be lawfully imposed are of two classes—conditions precedent and conditions subsequent. A condition precedent is one which is to be performed before some right dependent thereon accrues or some act dependent thereon is performed. (Section 1436 Civil Code.) A condition subsequent is one referring to a future event upon the happening of which the obligation becomes

no longer binding upon the other party if he chooses to avail himself of the condition, (Section 1438 Civil Code) and where an estate or interest is so given as to vest immediately, subject only to be divested by some subsequent act or event. (Section 1349 Civil Code.)

Broadly speaking, as applied to conveyances wherein conditions precedent are imposed, title does not vest in the grantee until performance. Where a condition subsequent is imposed, the title vests at once in grantee upon delivery of deed subject to defeat upon breach of conditions. Thus, if I deed to "A" upon the condition that he shall within six months erect a house on said premises, the title does not pass to him until the condition be complied with. If, however, I deed to "B" upon the condition that in case any house is erected thereon it shall cost a certain sum, there the title passes subject to be defeated upon breach of the covenant.

To establish of record the fact that title has actually vested in the grantee, upon performance of any condition precedent, a quit claim deed from the grantor imposing the condition, his heirs or assigns, should be recorded that any subsequent examiner of the chain of title will not be put upon inquiry to ascertain if the condition precedent were actually performed. Certain other conditions are void **abnitio**. Those imposing restraints upon marriage, except of a minor, are void, but this does not affect conditions where the intent was not to forbid marriage, but only to give the use of the property until marriage.

Conditions restraining the alienation of the property, when repugnant to the estate granted are void. Thus a condition inserted in the deed that the grantee shall not sell without consent of the grantor is void, likewise, a condition that the grantee shall sell to grantor **only** at a stipulated price is void. A condition subsequent which is impossible of performance is void. The title passes free of condition, but not so when the condition is precedent. If a condition precedent is impossible from the beginning, or for any reason incapable of performance, no title will pass. If a condition precedent requires the performance of an act wrong in itself, the deed is void and passes no title. If it requires the performance of an act not wrong of itself, but otherwise unlawful, the deed passes the title freed of the condition.

We come now to the consideration of covenants and conditions in deeds which relate to the use, occupancy and manner of improvement of the property granted, and as most commonly found in modern conveyances. Of late years it has become common custom in California, and particularly in this community, to grant lands upon conditions making for the betterment of the neighborhood.

It has indeed become such a custom that it may be said to be common knowledge that such conditions are invariably imposed in first class residence districts. It is not unlikely that Courts would take judicial knowledge of this fact. It is of the greatest importance to determine what notice of restrictions the purchaser of such property shall be deemed to have. These points must first be emphasized:

1. It is lawful to create covenants and conditions which may not run with the land, which will be binding upon all subsequent owners with notice, actual or constructive, for all time to come. The law permits the use of property to be restricted within reason and will enforce such agreements so long as the reason for such restriction exists.

2. Courts will not permit a forfeiture of title unless he who has the reverter come into Court with clean hands. He cannot violate his own agreement or acquiesce in the violation of similar agreements to the prejudice of any owner, nor will the Court enjoin or abate any violation at the suit of one who by laches or tacit consent has estopped himself in equity.

3. Courts are prompt to relieve property from such restrictions where the character of the property or the surroundings have so changed since the creation of the condition as to render the restriction unnecessarily burdensome, or of no benefit to him in whose favor they operate.

4. In cases where a general plan of subdivision is shown to be contemplated, either by reference in deed to such a plan, or to a map; or, if it can be ascertained from surrounding circumstances that conditions have been imposed in other deeds of lands in the same tract, in pursuance of a general plan of improvement, it must be held in the light of decisions that any grantee with notice, actual or constructive, of conditions or covenants in prior deeds in his own chain of title, or in the chain of title of other lots in the same tract, takes title subject to the restrictions and is bound by them. The grantor in such a case gives to his several grantees in the tract what has been termed a "negative easement" in all lots in the tract, which enables them in equity to restrain or abate any violation of the condition, and this whether it be so expressed in the deeds or not.

5. The common grantor may in such cases qualify his conveyances and limit the right of injunction or abatement to himself, or to the owners of adjoining property, or owners of property on the same street, or the like, in which case the persons to whom the right is limited are the only ones whose consent is necessary to an abrogation of the restrictions.

6. The common grantor who has created the conditions can-

not, even after he has parted with his remaining property destroy this negative easement by his own acts. He can release his right of reverter but no more.

There is much conflict in the decisions as to whether a grantee is bound to look further than to the deeds in his immediate chain of title for covenants or restrictions which might put him upon notice of matters affecting his own title. It would be an absurdity to say that he is required to examine every other conveyance made by his grantor to ascertain if his grantor has by any chance entered into covenants which might put the enquirer on notice of some right; but the weight of authority seems to be that he is bound by **actual** notice of such covenants, whether they be in his deed or not, and by such surrounding circumstances attending the execution of deeds from the common grantor, such as advertising, signs on the property and the like, or by such physical condition of the property and the vicinage as might put a prudent man upon inquiry as to possible restrictive covenants affecting all the lands in the neighborhood. He cannot shut his eyes and ears and say he had no means of knowing what is apparent to any observer or what is a matter of common cognizance.

It is true there are decisions of the Courts of this State that indicate that in the absence of recitals in the deed from the common grantor it cannot be inferred that the grantor intended that the restrictions should operate in favor of other property owned by him, notably Los Angeles, etc., vs. Muir, (136 Cal. 36), and Berryman vs. Hotel Savoy Co., (160 Cal. 569). But it is by no means clear in these cases that there were no circumstances pointing to such intent, or that evidence was adduced to show intent from surrounding circumstances. Such features of title are practically new in this State, and until the point is well settled by our Supreme Court, it will not be safe to assume that the grantee is bound only by such notice as he finds in his deed or chain of title. Owing to the fact that it has been the custom only of late years to insert restrictive covenants in deeds relating to the character of buildings, etc., there have been but few cases before our Supreme Court where these covenants are construed. We are therefore compelled to look to other jurisdictions to see what interpretation and construction other Courts have put upon such conditions, and from this investigation to make a surmise or guess at what our Courts would say under similar circumstances.

There are certain well defined rules of law and equity which apply in all jurisdictions, and it is safe to say that our Courts would follow the lead of Courts in other jurisdictions when similar cases are presented. We are therefore left in a situation of attempting to define in nearly every instance what the Supreme Court will say in

any given case. It follows therefore, that the illustrations which I shall use are not to be taken as conclusive, but merely as pointers, indicating what in all probability our Supreme Court would hold under like circumstances. For instance, our Supreme Court would in all likelihood hold that a condition that the property should never be owned by, sold to, leased to or rented to a person other than of the Caucasian race, is valid and binding. This and similar conditions indeed have been construed by other Courts and in a few instances held to be invalid, but the great weight of authority is in favor of their validity. It has been assumed that such a condition is in violation of the United States Constitution which guarantees equal right to all citizens, but the fallacy of this argument is apparent when it is considered that there are no public rights concerned in the transaction. I can do with my property as I see fit, sell it to whom I choose, and no man can compel me to sell; therefore, if I refuse to sell to a negro, that individual has no right of action against me. If the State were to undertake to limit or restrict the right of property in any colored citizen, any individual of that race could attack an act as being in violation of the United States Constitution, but the principle here is wholly different from that which governs the transaction between individuals. The same rules and principles apply to other races even though there be treaty relations between their sovereign governments which permit the ownership of lands in the alien country, but this, as I point out, is only where the public is concerned and no individual is affected by these public policies or rights given under public acts.

It is well established in every jurisdiction so far as I have been able to learn that restrictions as to locations of buildings on a given building line are universally upheld. So also those conditions or restrictions relating to the cost of the building and restrictions forbidding the sale of intoxicants. It has been held that the latter is a restriction in restraint of trade, and hence is void as against public policy, but almost universally it has been held that such is not the case. Here again we have the distinction between the public interests and private rights.

It is a rule of construction of such covenants and conditions that all questions of doubt must be resolved in favor of a free use of property and against restriction. It is a tendency of the Courts to discourage restrictions on the free alienation of property and its free use, and the wording of the deed must be construed as nearly as possible according to the obvious intent of the parties contracting, but the rule that when all other means fail doubts are to be resolved in favor of the grantee, do not apply in the construction of restrictive covenants. The opposite is the rule, and such construction must be

given it which would defeat a forfeiture in cases of doubt. The primary rule governing the interpretation of restrictive covenants is to gather the intention of the parties from their words by reading not simply a single clause of the agreement, but the entire contract must be ascertained and determined from the language of the covenant itself, considered in connection with surrounding circumstances at the time the covenant was made. It must be remembered that a Court can take evidence outside of the instrument to enable the Court to place itself in the position of the parties at the time of the making of the restrictive covenant for the purpose of ascertaining their true intention, but one who deals with a deed without this judicial construction is confined wholly and entirely to the words used in the instrument itself. In this construction the words used are to be taken in their ordinary and popular sense unless they have acquired a peculiar or special meaning in the particular relation in which they appear, or in respect to the particular subject matter, or unless it appears from the context that the parties intended to use them in a different sense.

I will recite a few instances where Courts have construed the words used by the parties. As I have stated before, these statements must not be taken as authoritative, but only as instances which point to a probable holding by our Supreme Court if the point were to be presented.

It appears to be generally held that when a person covenants that he will not erect a building within a specified distance from the line, he necessarily covenants that he will not erect any part of a building within the distance named. That it is a violation of the covenant if he erect a building with a massive porch or with a line of bay windows within the prohibited distance. It would also be held that the erection of a fence along the side of the lots high enough to shut off the view of the adjoining property would be held by the Courts to be a building. In one case it was held that a bill board of a permanent nature 15 feet high and 156 feet long erected along the boundary of the land was a building within the meaning of the covenant prohibiting building within a certain distance of the line. It was said it was not intended to affirm in every contract a bill board was a building, but in this particular case it was so held. Merely incidental encroachments on the space by way of steps or eaves or ornamental projection might not amount to a violation of the agreement not to build within a certain line, yet a porch extending the whole width of the house as a substantial part of it is clearly so. If it could occupy any part of the prohibited space, it could occupy all of it. It is held in one California case, Alderson vs. Cutting, (163 Cal., 503), that a restriction prohibiting the erection on

the premises in question of any building other than a residence with the customary outbuildings, and that such residence should not be erected less than a specified distance from the front line of said premises, was violated by the erection of a residence so that the roof of its porch extended 2 feet and 4 inches over the restricted space, the pillars of which encroached 5 inches thereon. In this case it was held that the placing of steps within the restricted space was not a violation.

The word "outbuilding" or "outhouse" has been defined as a building adjoining or belonging to a dwelling house. It is something to be used in connection with the main building. (Firth vs. Marovich, 160 Cal., 257.)

A stable cannot be held to be an outbuilding unless there is a main building on the lot.

The word "dwelling" in its broadest significance denotes a building used as a settled human abode and in common parlance, when not qualified, conveys the notion of a home; that it is a house occupied as a residence in distinction from a store, office or other building. In any proper sense there is always one controlling idea in the use of the word "dwelling house," and that is, it is a house intended for human habitation. A covenant that no building or structure of any kind whatsoever other than a dwelling should be erected thereon is violated by the erection of a private garage. The restriction against any use other than a private dwelling restricts the character of buildings by eliminating all buildings for business purposes, and also by force of the word "private" excludes buildings for residential purposes of public character, such as hotels or general public boarding houses or lodging houses.

The weight of authority seems to be that the erection of a flat or tenement house or apartment house does not constitute a violation of a covenant, providing that only dwelling houses shall be built upon the premises. A restriction prohibiting the erection of any buildings other than **a dwelling house** was held to forbid the erection of a double house with one entrance. I do not think this would apply had the words been "dwelling only," not confining it to a single house. Where the restriction is that not more than one dwelling house to be used as a private residence shall be erected, it was held that the erection of residential flats was a violation even if the number of houses was unrestricted. The erection of a double house on a lot constitutes a violation of a restriction forbidding more than one building to be erected on the lot for dwelling purposes only. There is a distinction between the term "flat" and "apartment house." The latter term denotes an entire building,

while the former means only the separate residential portions inside the building. There can be no exact or general rule of construction laid down where these conditions are met. It is the only safe rule to observe that Courts will hold the parties strictly to their agreements as disclosed by the instrument, but will not expand or enlarge their words to give them a meaning other than their popular or accepted meaning. Every case must be construed by itself, and it is a safe practice to take into consideration the surrounding circumstances and the surrounding neighborhood, the character of other buildings in the tract where reliance cannot be placed upon the exact language of the deed. It must be borne in mind that there are two rights created by such restrictive covenants; one in the grantor who retains to himself the right of forfeiture and reverter, and the other given to all other owners in the tract, or to such owners to which the right has been limited when the plan is one of general subdivision, and it can be shown that it was the intent to restrict and govern the use of property in all the tract.

Now, no property owner in the tract can maintain a suit to enjoin a violation or to abate a violation of such restrictions if he himself has violated them, or if he has stood by and not objected to violations of restrictions by other owners. Neither can the original grantor enforce his right of forfeiture against any particular one if he has waived this right in favor of any other owner, or if he himself has violated the conditions. I therefore suggest the following rules for your guidance in construction of covenants in deeds.

Conditional limitations as defined above, and all covenants and conditions which may by any possibility suspend the power of alienation beyond the lives of those in being at the time of the creation the covenant or condition may be ignored. Where it can be ascertained from the nature of the deed that the covenant or condition is purely personal, not directly and fundamentally affecting the use or occupancy of the land and the title has passed from the grantee in whose deed it appears, the covenant or condition may be ignored. In cases where the operation of a covenant or condition is limited as to time, the same may be ignored after the expiration of the time limit, provided there has occurred no breach; otherwise the same must be regarded until such time as an action for breach is barred by the Statute of Limitation, the period of limitation being five years as to actions to recover possession of real estate, four years upon an obligation created by an instrument in writing, and two years upon an obligation not created in writing. In many cases it will be found on investigation that upon expiration of the time limit of restrictions, no further rights of grantors or third persons remain, and the covenant can be ignored. Each case must be governed by

its peculiar circumstances. In cases where it is evident from the language of the deed and from surrounding circumstances or other evidences of intent that no general plan of subdivision or improvement was contemplated, or that the creator of the restrictions did not intend the same to operate in favor of other lands held by him, a quit claim deed from the creator, his heirs or assigns, will clear the title. Not so, however, if it be ascertained that the grantor held out to the world by representations, inducements, advertisements and the like that he intended the same as a part of a general plan of improvement, or that the same were created for the benefit of his remaining land. If by his deed it appears that the restrictions were created for his own benefit alone, or for the benefit of owners of adjoining lots, or lots on the same street, or the like, then to clear the title it will be necessary to obtain quit claims from the original grantor, and all owners of lots named as having the benefit. If he does not in such deed limit the benefit to any particular lots, or if by his deed he gives the benefit to all lots in terms, then quit claims must be had from all owners in the tract and from the original grantor even if he be not then an owner. As said before, each case must be determined on its merits, as no particular set of circumstances can apply to all cases.

This final word may be said, that one dealing with lands is bound by any actual notice of such facts which might lead to information concerning possible restrictive covenants outside of the deed submitted to him, and outside of the record. This in practical application means that one is bound to inspect the property and the neighborhood. If he receive a deed, we will say in Westmoreland Place, containing no restrictive covenants, and there be no restrictive covenants in any deed in his chain of title, yet he would be held to notice of such restrictive covenants in other deeds by the very character of the property and its surroundings. He could not go into this beautiful place where the houses are all of permanent and costly character, all set on a certain building line, and a certain distance apart, and seeing all this say that he had no notice of possible restrictions, simply because his deed did not contain a reference to it.

And lastly, do not advise a client or customer that restrictive covenants are void when there is no time limit fixed for their expiration. They will continue so long as there is a reason for their enforcement, and the Courts will hold the parties to their valid contract.

IV.

Descriptions of Land

It is a matter of astonishment to consider the number of deeds which are rendered uncertain or void by reason of mis-description of the land sought to be conveyed. One would naturally think that the most particular care would be exercised when the parties came to determine the very identity of the thing dealt with. In nearly every instance the exact location and dimensions of the land conveyed are of first importance to the parties; yet the cases are legion where through carelessness or ignorance of the draftsman, the deed is rendered inoperative by errors in description, while the deed may be otherwise perfect. Very frequently the fault arises from excess of caution. The draftsman in seeking to more fully describe the property multiplies words and attempts two or more descriptions which may be repugnant one to the other, and in his attempt to make the description certain, defeats his purpose and makes the deed uncertain or void. Too much cannot be said of the need of care in framing a description. It should be that any one can read and know what is intended from the instrument itself. A court has power to inquire into facts and circumstances surrounding **latent** defects in description. That is to say in cases where the defect is not patent or apparent from the face of the deed itself, but where it is necessary to determine what the parties intended by certain phrases used. This evidence the courts can take outside of the recitals of the deed itself, but even courts cannot do this when the defect is **apparent** on the face of the deed.

The law makes no presumption concerning the title of the grantee under his deed. He holds by force of his grant. If there is anything equivocal in the language of the grant the courts can declare its interpretation. But if the parties have used plain and explicit language—if they have fixed a boundary which no man can mistake, courts have nothing to say by way of interpretation. This is not to be confused with the power which courts have to ascertain the true intent of the parties from competent evidence, and in cases where it be found that the defect or misdescription occurred through mutual mistake, to decree a reformation of the deed to carry into effect the true intent of the parties. Thus, if I own lot one and sell it, and by mutual mistake my deed describes

lot two, the defect is patent or apparent. No Court can say that by the use of the word "two" I meant lot one. But the Court can in a proper action take evidence wholly outside of the deed itself that it was the true intent to describe lot one; that the error occurred through mutual mistake and will reform the deed so that it may read lot one and not lot two. It will be seen therefore that most of the rules of construction of conveyances laid down by the authorities are for the guidance of courts in interpretation, and where the same bear upon latent defects which may be removed or explained by evidence other than the instrument itself they cannot with safety be relied upon by individuals dealing with the lands. No individual can usurp the powers of the Court. When a Court of competent jurisdiction has construed a conveyance in accordance with the intent of the parties the matter is settled, and thereafter the words of the Court are the words of the parties themselves, but the grantee or one dealing with him before such judicial determination cannot safely rely upon the rules by which the Court reached its decision.

What are boundaries is matter of law, but **where** they are is matter of fact. This discussion will therefore be confined to those rules of law which apply strictly to the intent of the parties as disclosed by the instrument itself These elemental rules of construction, as I have said, are the only ones which an individual dealing with the land may apply. Where he seeks to determine the intent of the parties by any other evidence he does so at his own risk. His judgment may not be that of the Court if the deed be assailed.

It is a cardinal rule of construction to arrive, if possible, at the true intent and meaning of the parties from a fair consideration of the whole instrument. It must be read from the "four corners" and every word must be given meaning and effect, if an effect can be given to it not inconsistent with the general terms of the whole instrument when taken together. As pointed out the grantee and one dealing with him are strictly bound by that intent as they find it in the words of the instrument itself.

We now have to do with such rules as apply to such construction. The general doctrine as to boundary by physical monuments is tersely stated by the Supreme Judicial Court of Massachusetts as follows:

"Whenever land is described as bounded by other land, or by a building, or structure, the name of which according to its legal or ordinary meaning includes the title in the land of which it has been made a part; as a house, a wharf, or the like, the **side** of the land or structure referred to as the boundary is the limit of the

grant, but where the boundary line is simply by an object, whether natural or artificial, the name of which is used in ordinary speech as defining a boundary and not as describing a title in fee, and which does not in its description or nature, include the earth as far down as the grantor owns—and yet which has width—as in the case of a way, a river, a ditch, a wall, a fence, a tree, or a stake—the center of the thing running over or standing on the land is the line of boundary of the lot granted."

A description is sufficient by which the identity of the premises can be established; the office of a description is not to identify the land but to afford means of identification, and when this is done it is sufficient. Thus if I deed the "Malibu Ranch" this is a means of identification, for it can be shown that I intended to convey a parcel of land the dimensions and area of which could be determined from sources outside the grant. It is not necessary that I literally define the boundaries, for it can be identified from sources outside my deed, but a careful conveyancer will at all times, if possible, give an accurate and simple description of the premises dealt with, rendering inquiry aside from the deed unnecessary. It follows that where there is not enough in the deed to denote upon the face of it the particular tract intended to be conveyed, or if the description is too vague and uncertain for identification the deed is void. Thus if I describe "a lot in Los Angeles," or "a tract of land near Santa Monica" without further identification, my deed will be void. In the hands of one who has paid a consideration and who can prove that I intended to convey a particular piece of property, a Court upon proper proceedings would reform my deed to truly describe the property, but this is only in the cognizance of the Courts, and such evidence as might induce a Court to reform the deed cannot with safety be relied upon by a grantee, or those claiming under him, without such judicial determination. However, if the tract to be granted appears clearly and satisfactorily from any part of the description, the addition of any false circumstances of description may be disregarded, and if enough remain to identify the particular tract intended to be conveyed the deed will be operative.

The most certain boundaries which exist are those by natural objects or permanent artificial objects. These are called "monuments," and when aptly made the boundaries or stations in the boundaries, prevail over all other calls in the deed. Where known monuments are referred to as boundaries or stations in the boundaries, they must govern, though courses, distances, angles or computed contents fail to correspond with such boundaries. Thus if a description runs, "North 45° East 150 feet to the intersection of the

center lines of Figueroa and Tenth Streets" the call carries us to the intersection point, although it be North 30° East and 100 feet from the beginning point. Again where the call is by courses along the North line, we will say of Tenth Street, and the courses do not correspond with the North line of Tenth Street, the line of the street prevails.

In government patents it is the rule, where land is bounded by navigable water, to describe the meandering line of the water by courses and distances, but this is only for the purposes of estimating the amount of acreage paid for by the patentee, and where the water, or any particular line of the water is referred to as the boundary, the courses and distances may be disregarded for the water itself, or the line of the water itself, at any instant of time is the true boundary.

Again, where the description was beginning 298 feet from the intersection of two streets, at middle of a wall, the wall must be considered the initial point though it be but 293 feet from the intersection of the streets. Where grant was made of 120 feet on a certain street "including a stable situate on the rear of the premises," and to include the stable, the lot should be 131 feet, the deed conveys 131 feet. This rule is modified where there is a doubt as to what monument was intended, in which case courses and distances may be consulted to ascertain the true intent. Thus in the case above cited if there be two barns on the rear of the premises, one 120 feet from the beginning point and one 131 feet from that point, the call for 120 feet would govern.

A particular description controls and renders certain a general description. Thus, if I describe the property as "Lot A," and follow this with a mete and bound description which describes more than "Lot A," if I own what is particularly described, the mete and bound description prevails, and the statement that I convey "Lot A" is not conclusive.

Where the deed contains two descriptions equally explicit, but there exists a repugnance between them, that description prevails which the whole instrument shows to have been the intent of the parties. Where each description is of equal authority, that one must be adopted which is most favorable to the grantee.

There are cases where a general description will prevail over a particular one, as for instance if a general description is followed by a mete and bound description which is clearly erroneous, the general one will prevail. I convey the S. E. ¼ of a section containing one hundred and sixty acres, and so describe it. I follow this with a particular description which only describes eighty acres The first description prevails and the second may be ignored.

If a general description be definite and certain in itself, and a particular description uncertain and indefinite the general one prevails. Where there are two descriptions, one of which describes the property by name or lot number, and the other particularly by metes and bounds, which is erroneous and does not cover all the land described in the first, the latter must be rejected.

A conveyance by metes and bounds of land in the N. E. ¼ of a section where the monuments called for are fixed and certain is not vitiated by the statement that the land is in the S. E. ¼ of the section.

If a grant contains different descriptions, one of which applies to land which grantor owns and the other to land which he does not own, the former shall be taken as true and the latter as false.

A grant by metes and bounds describing accurately a certain tract, the description followed by words, "being an undivided one-half" of a certain larger tract conveys an undivided half of the whole tract and the mete and bound description shall be disregarded.

If there be two clauses which are inconsistent with each other and they cannot be reconciled, the first, if it be complete in itself, prevails, but if further matter of description is added which modifies and colors what precedes it, it is not rejected as repugnant, but the whole, if possible, is to be construed together.

Courses laid down which are repugnant to the remainder of the description may be rejected if the remainder is sufficient and consistent to uphold the grant according to the evident intention of the parties.

Where a description contains false and true statements, if the true are sufficient to identify the land the false may be rejected. The statement as to area is not controlling, except where the grant is by area alone as "South 10 acres" of a particular tract without qualification. This part of a description is the last to be resorted to; but where the description equally admits of two constructions, one of which would make the quantity agree with that stated in the grant, while the other would not, the former must prevail.

It is well to observe here that unless the sale is made at so much per acre or so much per front foot, the dimensions to be determined, the buyer cannot complain if there be a shortage, nor the seller, if there be an excess when the true dimensions are discovered. One buys land in a parcel or lot as he buys any other physical thing which he can see and examine for himself. The statement of a seller that his tract contains so many acres, or his lot has so many feet frontage, is immaterial if the bargain be not made on that basis. The statement of a surveyor made on a map as to area or dimensions is not controlling. It is overcome by the

actual measurements on the ground as established by monuments, courses and distances. It is encumbent upon one dealing with lands to ascertain if possible the location of the original monuments. In Los Angeles, most of the monuments established by Ord and Hancock have been obliterated, if indeed they were ever set. Owing to the well known inaccuracies of these surveys, the Supreme Court of this State has held that the lines of buildings and improvements long established must be taken as the true lines of the original survey.

It is a sound rule that a perfect description which fully describes the property is not to be defeated by the addition of a further and false description and by words added out of extra caution which have no tendency to make a general description uncertain. Thus a deed accurately describing land by proper Section, Township and Range which actually lies in Los Angeles County is not void by reason that it is falsely stated that it lies in Kern County.

The law will construe that part of a deed to precede which ought to take precedence in whatever part of the instrument it may in fact be. Words cannot be transposed unless there is something in the deed itself which shows that reading the deed as it is will defeat the intention and that by transposing words and sentences the true intent will be found though badly expressed. When all other means fail and a doubt still remains, that construction must prevail which is most favorable to the grantee, and this has been held to be true even in grants from the State; the same being as to description governed by the same rules as those between individuals. It must be remembered that in grants from the United States or from the State of California the intendments are in favor of the grantor while between individuals they are in favor of the grantee. It would appear from some authority that this doctrine as to strict construction of statutory requirements does not apply to descriptions.

Where a description is followed by an exception which is uncertain, the exception may be void for uncertainty, but the description will stand, as for instance a grant of S. W. ¼ of a section "except one acre." If there be nothing in the chain to put a prudent purchaser on inquiry as to the particular acre intended to be excepted the whole passes and the exception is void.

There may be an exception out of an exception and the part secondly excepted will pass. As "except the South ten acres," except "that part North of the fence." Here "that part North of the fence" passes by the deed.

It is very important to observe if the description refers to any other deed or to a map or a survey for, if it does so, this has the

effect to incorporate in the deed the instrument referred to as fully as if it were copied verbatim in the deed, and what is described in the instrument referred to will pass. Thus a deed describing the land by courses and distances, with the addition of the words, "being the same premises described in a deed from 'A'," was held to convey the whole premises in that deed, though a small strip was omitted in the mete and bound description.

It is important to examine all maps and surveys to which reference may be made, as frequently the map will show matters as to rights of way, easements, building lines and the like which are not disclosed by the deed itself. Remember that everything referred to in the deed is of the same import as if it were described in terms. This is of great importance and a point that cannot be too strongly emphasized.

Much confusion arises from misuse of terms of direction. The amateur in framing description is unable to distinguish the difference between "North" and "Northerly." The rule is simple and when intelligently applied there can no confusion arise. The terms "Northerly," "Easterly," etc., when used without qualification and without reference to monuments are to be construed as meaning due "North," due "East," etc., and the terms "North," or "East," etc., when controlled by other well defined description or monuments will be read "Northerly" or "Easterly," etc. By statute in this State the words "North," etc., denote true courses and refer to true meridian unless otherwise declared. The variation of the magnetic needle from the true meridian is approximately 15 degrees in this locality. All descriptions by metes and bounds should be thus qualified.

All lines between monuments, unless qualified, are to be taken as straight lines, and the actual measurement between monuments prevails over statement as to distance.

Boundary lines may be established by agreement of owners. This may be done only where the description of the boundary line is indefinite and uncertain and parties to the agreement own on both sides of the agreed line. Not so, however, when the description of the boundary line is certain, for no subsequent agreement will vary the terms of the grant and title to land does not pass by agreement. While actual title cannot pass by agreement, yet where the parties have agreed upon a certain line as being the original line intended as the boundary, they are estopped by their agreement to assert the contrary.

Unless there be contrary intent expressed all grants bounding on a natural pond or lake extend to ordinary line of low water mark; on navigable streams and tide waters to line of ordinary high

water mark. The same rules hereafter noted as to meandered lines and shifting boundaries apply here. When a range of hills is the boundary the summit line is the true boundary unless otherwise expressed. The mouth of a stream where it empties into another stream is the point of intersection of center lines; where it empties into a natural lake, or into tide waters at point of intersection of its center line with the line of ordinary low water, or ordinary line of high water mark, as the case may be.

When the boundary is by a stream not navigable or by a public highway, the title conveyed extends to the center of such stream or highway unless a contrary intention is clearly manifest from the grant itself; and this rule is applicable when the land conveyed is a fractional government subdivision, or any government lot, or any lot designated on a plat by number or otherwise and shown by the plat to abut a public way or an innavigable stream. Now the question of intent, here, to be gathered from the instrument, is frequently a close one. It is of the highest importance that such descriptions be subjected to the closest scrutiny as will be shown later in discussion of subjects of shifting boundaries and vacation of highways. It must be borne in mind that government "meander" lines are run, not for the purpose of accurately fixing boundary lines upon the ground, but to determine the acreage granted and to be paid for by the purchaser. Hence, when the meander calls are run with reference to a stream, or a body of water, even though the courses do not exactly agree with the course of the stream, or the water line, and monuments be set at considerable distance from the water line, the thread of the stream, or the body of the water will yet be the true boundary. Where the call is say, "on the East by Tule Creek" the thread, or center line of the stream at any instant of time is the boundary. Where the land is shown by plat to be bounded by a stream and grant is made with reference to the plat the boundary is the thread of the stream. If, however, meander lines are run without reference in terms to the stream, and there is no accompanying map to show that the meander line is intended to be in fact the water line, then the stream must be deemed to be excluded, and the grantee is confined to the exact line of the survey.

It is the general rule of law, founded on public policy, that proprietors in the absence of intent to the contrary expressed in grants to them, shall own to the center of all bordering innavigable streams and public ways. It is of the first importance to know what construction courts have put upon words denoting intent. In the absence of any reason to the contrary the grantor will be held not to have reserved anything that could be of no great value to him, but which could be of great value to his grantee, and courts are

alert to give every advantage in construction to uphold this doctrine; but no rule of construction or sympathy of court can alter the effect of words or terms which in their ordinary and accepted sense are plainly and unequivocally those of exclusion. It is therefore held that where the call is by the "margin," "the edge," "the bank," "the side," or "East line of," "outer line," "near line," and the like, the grantee does not take to the thread of the stream, but is stopped at the monument called for. However, such terms as "bounded by," "running along," "with the stream," "running by," "to the line of the stream," "with the meander line," "fronting on," "lying along," "abutting on," and the like are those of inclusion on the principle that where a natural monument is called for without expression of intent to the contrary, the call goes to the center of the monument. If the stream by any apt words of inclusion is made the monument, the call goes to the center; but if apt words of exclusion be used, and a certain line of the stream be called for, the line, not the stream is the monument. The importance of this distinction is manifest when change occurs in the location of the water boundary. In cases where the parties must be held to have determined upon a fixed and certain line of boundary other than the body of the water itself, the boundary line is not affected by the shifting in location of the body of the water. In cases, however, where the boundary is the body of the water itself, without restriction to the contrary, the title follows the shifting boundary if the change be from natural causes and by slow and imperceptible degrees. Where the change occurs from artificial causes or from sudden, abrupt natural causes, as by flood or tidal waves or earthquake, no change occurs in line of boundary in the eyes of the law.

In cases where land is added either by the accretion of alluvion or reliction of the water from natural causes by slow and imperceptible degrees, examination of all grants in the chain of title, occuring from time to time during the process must be made to ascertain in what manner the added land has been dealt with. By the common law lands so added become the property of the upland owner on the theory that by reason of his riparian ownership he should profit by the addition as he would suffer loss if the water encroached upon his lands; and upon the further theory that being deemed to have purchased his upland with a view to the peculiar advantages to him from water frontage, he should, as a matter of right, continue a riparian owner, when land is formed between his upland and the water's edge, as changed. The common law has been adopted in some jurisdictions and modified in others by statute, as each state may as sovereign declare what these rights of riparian owners shall be, and all courts, State and Federal, are

bound by these statutes. The U. S. Circuit Court of Appeals, in Western Pacific Railway vs. S. P. Co., 151 Fed. 400, holds that since the adoption of the codes this common law rule is abrogated in this State so far as the same applies to shores other than those of rivers and streams. It must be conceded then, that until the statutes are amended, or until the decision in said case is overruled that the upland owner whose boundary line is **fixed and certain** gains nothing in this State by reason of accretion except he be riparian to a river or stream. But it may be argued that this is not true where his boundary is the line of the water itself, for it is a shifting boundary, and title to added lands is acquired, not by the law of accretion which gives the upland proprietor ownership by **reason** of his grant, and its peculiar location, but by the **description** in the grant itself which includes such added lands. The grantee bounding on the line of the water and not restricted to the fixed line, is the owner at all times to the line of his boundary wherever it may be at any moment of time. There must be lands added in fact to invoke any rule of law. That rule is invoked which the descriptive words of the grant make applicable. If the boundary line by the description is fixed, without reference to the line of the water itself, the law of accretion applies; if it be the line of the water itself, the law of boundary applies. There is such a thing as a movable freehold and it has been said by the U. S. Supreme Court that a water line, though it may gradually and imperceptibly change, is just as fixed a boundary in the eyes of the law as a street or wall. In grants of such added lands it is the rule that where the water line is the boundary and there be no contrary intent expressed, the deed by the original description carries such added lands without special designation, upon the theory before expressed, that in cases where such lands be added from natural causes, by slow and imperceptible degrees, the boundary line of the original grant is extended to embrace them. This is not true, however, in cases where the original line of boundary is fixed. Here the upland owner takes by law of accretion and the added lands become a part of his holdings, but under different designation and title. In grants of such holdings the added lands must be specifically described to pass, as land does not pass as appurtenant to land.

By statute in this State islands and accumulations of land formed in the bed of streams which are navigable belong to the State, if there is no title or prescription to the contrary; if formed in a stream not navigable the same belongs to the owner of the shore on that side where the island or accumulation is formed; or if not formed on one side only, to the owners of the shores on the two

sides divided by an imaginary line drawn through the center of the stream. The rule of construction fixed in this State by statute is that where tidewater is the boundary the rights of grantor to ordinary high water mark are included in the conveyance. When a navigable lake, where there is no tide, is the boundary, the rights of the grantor to low water mark are included in the conveyance; but in following this rule the distinction between fixed and shifting boundaries must be borne in mind. By statute likewise in this State, where a road or stream of water not navigable is the boundary the rights of the grantor to the middle of the road, or the thread of the stream, are included in the conveyance, except where the road or thread of the stream is held under another title.

We now come to consider the subject of boundary by a public way. Section 831 C. C. declares:

"An owner of land bounded by a road is presumed to own to the center of the way, but the contrary may be shown."

And Section 1112 C. C. declares:

"A transfer of land bounded by a highway passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof, unless a different intent appears from the grant."

In some of the states the ownership of lands in public ways is arbitrarily fixed by statute for reasons of public policy. By statute in this State the public acquires but an easement whether by deed, dedication, or condemnation. Now the grantor of land adjoining a public way is presumed to grant the fee to the center of the way unless a contrary intent appear in the deed; and again, the presumption that the grantor takes to the center does not obtain if his grantor did not in fact own the fee to the center of the way; for the law will not presume that the grantor intended to convey that which he did not own. When the conveyance in terms conveys soil in the highway there is of course no question, for in such case the grantee takes by the very terms of the grant; but where same is not included in the description in terms, and there be nothing in the deed to indicate that it is not grantor's intention to convey to the center of the way, the law presumes he did so intend, and gives the fee to the soil in the street to his grantee by reason of his grant and peculiar location, and for reasons of public policy. It will not be presumed in absence of words indicating clear and unmistakable intent to the contrary that grantor intended to reserve that which could be of no practical use to him, as I shall presently show that even if he retain the fee in the way and the way be abandoned he cannot use the land to the detriment of his grantee.

The construction placed upon words indicating an intent to

exclude any portion of the way is highly important; particularly when the way be vacated. The same rules which apply to boundaries on waters, (except shifting boundaries), apply here. Where the call is a certain line of the street as the "East line," the fee to the land in the street will not pass, but where the call is to the lot line, though it be in fact the East line of the street; or where it is to the East line of the street and thence along the street, or street line, or line of the lot the fee to the center will pass, even though the call for distance is insufficient to carry to center line of the street. It must be remembered that all intendments here are taken most strongly in favor of the grantee and the language must be clear and explicit to justify the reservation of any part of the way. Often, in cases where the way has been widened, there occurs after an otherwise definite description some such clause as: "Except the South 10 feet within the lines of First Street." Here is a clear exception of the land itself, and the fee will not pass; but where by any reasonable construction it can be determined that it was the intent to except the easement for the way the fee will pass as: "except the South 10 feet taken for First Street," or "to be used as a street," or "deeded for First Street," or the like. It should be borne in mind that the act of vacation of a public way confers no title. There is no reversion. If the deed to the abutting land owner is sufficient to vest in him the title to land in the way before vacation, it rests in him after the vacation, freed of the burden of the easement. It is a part of his original holding but by a different designation; hence the grant of land abutting a public way after vacation of the way, does not pass title to land formerly in the way without specific description of the same. It was never any part of the lot and the lot lines are not extended by the act of vacation to embrace it.

The abutting owner has a peculiar right in the way distinct from that of the public, whether he own the fee in the way or not; and this is a property right of which he cannot be deprived without due process of law and compensation to him. If the public use of the way be terminated by vacation, the abutting owner still has the right of ingress and egress over the way if the fee thereof be in his grantor, even if the abutting owner consents to the vacation and his grantor cannot after vacation exercise dominion over the strip formerly in the street in derogation of his grantee's right. Thus, if the grantor owns the fee to all the land in the way, and a new way be opened adjoining the old,—the West line of the new way, we will say, being the East line of the old,—the abutting owner of lands adjoining the old way on the West, has yet his easement over the old way to reach the new, and the owner of the fee cannot build upon his land in the old way, or otherwise exercise dominion over

it to prevent the exercise of this right. This is not true where the grantor owned but half the land in the way, for the lot owner cannot by simply consenting to vacation acquire rights in the land of a stranger. In any case his rights are confined to the lands in the vacated way owned by his grantor. He cannot claim right to cross lands of another to reach the new way. If he be cut off from access to a public way by reason of vacation of the old way he cannot be heard to complain, for he has consented to the vacation and the law will presume the intended consequences of his own act. It is possible to deprive the abutting owner of all his rights in the way, public and private, by due process of law and upon compensation and he may be cut off from access to any way if the proceedings be sufficient and he be given an opportunity to demand compensation, for the compensation may extend to the full value of his property. It is not necessary that he be in fact compensated if he be given an opportunity to be heard and demand compensation. If this be not done, vacation is not effected as to him, and he has the same use of the way as formerly, whether he own any fee in the way or not and despite the fact that the public use is terminated. An interesting monument to this principle in shape of a crumbling adobe wall stands near the Plaza in this city. An attempt was made by the municipal authorities to vacate Negro Alley, but the proceedings so far as they concerned Ballerino were insufficient to accomplish this. Los Angeles Street was opened to the west of Negro Alley, leaving a narrow wedge of land owned by Bigelow between the new street and Negro Alley. Ballerino owned land on east side of Negro Alley. He promptly acquiesced in the vacation, claiming a frontage on the new street corresponding to that which he enjoyed on Negro Alley. Acting upon this claim he encroached upon that part of Negro Alley and the Bigelow strip lying between his side lines extended west to Los Angeles Street. Bigelow brought suit to quiet title, conceding the ownership of Ballerino in the east half of Negro Alley. When Ballerino discovered that the proceedings in vacation were insufficient as to him he repented of his act of consent, and the court found he had not waived his right to compensation as he was not acting with knowledge of his rights. Held, that Ballerino is entitled to all the rights he formerly enjoyed in Negro Alley, among which is included his easement in the piece of land which is a part of Negro Alley claimed by Bigelow, and the right to have the same kept open. Though the fee in that piece is declared to be in Bigelow he is not entitled to exercise dominion over it in derogation of rights of Ballerino.

In computing the area owned by an abutting owner in an adjoining way which has been vacated the lines must be drawn at

right angles to his frontage to conform to Sec. 1112 C. C. which declares that he own to the center of the way in front of his lot.

Cases are found where the map of a subdivision contain the statement that the area of lots is computed to street centers. Where grants of fractional portions of such lots are found, the construction must be that the lot is the parcel bounded by the exterior lot lines shown on the map, and the statement on the map as to area must be disregarded, unless the grant itself in terms, includes the land in the street. A simple reference to the map is not sufficient. While such reference incorporates the whole map in the grant the statement as to computation of area shown thereon does not have the effect to extend lot lines. They must remain as delineated. Great care must be exercised in such cases and all grants of parts of the lot from the common grantor examined for possible conflicts. For example, a grant of east half of a twenty-acre lot, where reference is made to map which states that area is computed to center of adjoining streets, and description be further unqualified, conveys the east half of the parcel **inside the lot lines,** and does not convey ten acres. In like case, a deed of east ten acres conveys more than the east half. Descriptions beginning on the line of such a lot a certain distance from the corner of the lot must be construed as beginning that distance from the intersection of lot lines and not from intersection of street center lines. The grant itself must disclose the intent to compute acreage to street centers or that result will not be accomplished. Any clear expression of such intent will serve as "acreage computed to center of adjoining street," or the like.

No general rule can be laid down for construction of exceptions and reservations in grants. Each case must be considered alone. To properly construe such clauses every word must be weighed, every shade of meaning considered and every part of the grant carefully scanned. The books are filled with decisions of the Courts upon disputed construction of such clauses and some of the finest learning in the law bears upon the question. Any appropriate words as, "except," "besides," "saving," and the like, which clearly indicate the intent, will be sufficient to create an exception. So an exception may be made in the form of a reservation, or reservation in form of an exception. An exception in a grant withholds from its operation some part or parts of the thing which, but for the exception, would pass by the general description to the grantee. A reservation, on the other hand, is the creation of some **new** right issuing out of the thing granted, and which did not exist before as an independent right in behalf of the grantor. In distinguishing between a reservation and an exception the words "reserving" and

"excepting" are not conclusive in determining which is intended. The character and effect of the provision itself must determine what is intended. If the intent of the deed is to vest in the grantor some new right or interest which did not before exist in him independently of his ownership of the land, it is a reservation, no matter what language is used; but if it be the plain purpose not to create such a new right or interest which would vest in grantor, but to recognize and withhold from the grant an existing right which would otherwise pass to the grantee, an exception is made whatever language is used. An exception is always some part of the estate not granted at all, a reservation is always of something taken back out of that which is granted, no matter what name the parties may give to them. Whenever possible then, by the words of the grant, which must be taken most strongly against the grantor, where the thing treated does not belong to some one other than the grantor, or is not held by the grantor independently of his ownership of the premises granted, the construction should be that the intent to reserve the right, rather than to except the land. As where the exception of a family burial ground described by metes and bounds, or of "South 40 feet to be used as a right of way;" or of "South 12 feet for alley way;" the easement only was reserved.

We come now to consider descriptions made by the draftsman. It should be the aim of the draftsman to clear away all uncertainties so far as possible and furnish his client an accurate professional description for future use. As we have seen, no little ingenuity is necessary in reconciling vague and uncertain descriptions in instruments of record, and here I repeat that the draftsman is confined strictly to the record. Thus, in writing a description, unless there be a clear exception in some grant in the chain of title, that portion in a public way should not be excepted from the description—the fee title should pass subject to the easement. Where there has been a grant of right of way, as to a railroad, or canal company, or the like, the easement should be shown and no exception made, that the grantee in the deed to be made shall have the reversion. While the draftsman may rely upon the record as he finds it, yet he should so far as he is permitted, frame his description to avoid entanglements and complication in actual measurement of the ground. This is necessary by reason of inaccurate surveys and incomplete maps. He is called upon, we will say, to divide a lot into several parcels. The beginning point for each successive description should be the closing point of the one immediately preceding and ties made. There should not be one description running from the East and another from the West without ties. The reason for this is obvious when we consider that there may be an excess or shortage in

ground measurement over or under the record distance. Take a case where A is the owner of a lot 100 feet North and South as shown by the recorded plat. He conveys the South half. By the record he has 50 feet remaining in him, but the draftsman should describe it as the North half. Should a conveyance be found of the South 50 feet, then the draftsman should so describe it, and not as the South half. Called upon for a description of the remainder he should describe it as all of the lot except the South 50 feet. If deeds be found of record of North 50 feet and South 50 feet, the draftsman should follow such descriptions. When framing a description of certain part of a lot, the lines of which are not with the cardinal points of the compass as "Northerly 50 feet" it should be qualified by apt words to show intent to convey a strip of uniform width of 50 feet. If the conveyance is of say, Northerly 50 acres, the Southerly line should be a line parallel with the Northerly line of the lot. Care should be taken in writing descriptions by metes and bounds where the courses are not with the cardinal points to fix accurately the courses by angles or by tie to record monuments. For example, where the Westerly line of a lot is not at right angles with the Northerly line and it is desired to begin on the Westerly line 50 feet from the Northerly line, the call should be "beginning at a point in the Westerly line said lot distant Southerly 50 feet measured **along said line** from Northerly line of said lot," otherwise without the qualifying words "along said line" the construction must be that the beginning point is 50 feet South of the Northerly line measured at right angles thereto. Again in all descriptions of fractional parts of lots the area of which is shown by recorded map to extend to street centers, it must be borne in mind that the boundaries of the lot do not extend to street centers, and if it is intended to make center lines of streets the boundaries, apt words to that effect must appear in the deed itself. In bounding by streets in cases where grantor owns the fee in the street, unless there is some grant in the chain of title which prevents, reference to **certain** lines of the street, unless it be the center line, should be avoided. Any call to the street will be sufficient to pass title to the center of the street, if the actual boundary be not a **side** line so described in terms. The same rule applies to water boundaries, where it is the intent to make the thread of the stream or the body of the water itself a boundary.

Where vacation of a way has been had, or accretion to a fixed boundary line has been made, the land formerly in the way or the added lands should be separately described or included in an entire description by metes and bounds. So far as possible only those monuments which are shown of record should be mentioned and

reference be made to official maps and surveys of record. The multiplying of words and the writing of two descriptions should be avoided. In short, and as a final word, that description is the best which is in simplest terms, accurately furnishes identification of the premises in question and describes none other.

V.

Mortgages and Trust Deeds

There are important distinctions between a Mortgage and a Trust Deed given to secure the payment of money. While in practical effect both work as security, there are certain rights and remedies under such instruments which are sharply distinguished.

A Mortgage under the laws of our State creates but a lien. The Mortgagee takes no title, no matter in what form the instrument is made. This is not true in all states. In many jurisdictions a Mortgage conveys a defeasible title to the Mortgagee. That is to say, he holds the legal title until the debt is paid. This gives him many higher rights than are conceded by the laws of the State of California. In this State he has a lien only, but if he take possession of the property he cannot be ejected until the debt be paid.

A Mortgagee, has under the ordinary form of Mortgage, a right of entry upon the premises to protect his security. Usually the covenants of the mortgage give him the right to prevent waste, to irrigate and the like if the Mortgagor neglects or refuses to do these things. He has not the right of entry by reason of any title, but only by reason of the contract between him and the Mortgagor; hence the Mortgagee cannot maintain or defend any suits relating to the title of the property. He can only enforce or defend his lien.

To acquire title to the property he must proceed to foreclose the equity of redemption of the Mortgagor by an action in the Superior Court. Then is set in motion the machinery which in time will transfer the title from the Mortgagor to a purchaser at the

[1] MORTGAGE—ASSUMPTION OF DEBT BY GRANTEE—CREATION OF PERSONAL LIABILITY—MANNER OF.—In order to render a grantee of mortgaged property personally liable for the mortgage debt it is not essential that the assumption of the debt should be recited in the deed, or that there should be a formal promise to pay on the part of the grantee, since the obligation may be made orally, in a separate instrument, or implied from the transaction of the parties.

Andrews v. Robertson, 55 Cal. Dec. 303.

[2] ID.—AGREEMENT FOR EXCHANGE OF MORTGAGED PROPERTIES—CONSTRUCTION—PAYMENT OF MORTGAGED DEBTS NOT ASSUMED.—A written agreement preceding an exchange of mortgaged real properties reciting that each party was conveying to the other his property subject to the liens of specified incumbrances, does not import any assumption by either party of any mortgage debt.

Id.

[3] ID.—SUBSEQUENT PROMISE—PROTECTION AGAINST MORTGAGE—PAYMENT OF DEBT NOT ASSUMED.—An oral statement made by one of the parties after the making of the agreement, and at the time of meeting to carry the agreement into effect by exchanging deeds, that he would protect the other party against a certain mortgage, is insufficient to create an agreement to pay such debt, since it was but a mere voluntary promise and without consideration.

Id.

[4] ID.—FORECLOSURE OF MORTGAGE—DEFICIENCY JUDGMENT—RIGHT OF APPEAL.—An appeal lies from a deficiency judgment dock-

GRANTEE'S ASSUMPTION OF MORTGAGE

White v. Schader, ____ Cal._____, 61 Cal.Dec. 559; May 4, 1921.

(syllabi:)

(1) MORTGAGE - ASSUMPTION OF PAYMENT BY GRANTEE - PAROL EVIDENCE. - An agreement to assume and pay a mortgage is not inconsistent with a deed reciting that the property is granted sugject to a mortgage. Consequently such an agreement may be shown by parol evidence.

(2) ID.- PAYMENT OF MORTGAGE - PART OF CONSIDERATION- DUTY OF GRANTEE. - Where the payment of a mortgage forms part of the consideration of a conveyance the grantee is bound to pay the same, and the rule is the same, although there be no assumption of payment of the indebtedness, if the purchase be made expressly subject to the encumbrance, and the amount of the indebtedness thereby secured is included in and forms a part of the consideration of the conveyance.

(3) ID. -ASSUMPTION OF PAYMENT OF MORTGAGE - RECOVERY OF DEFICIENCY - TIME OF ACCRUAL OF CAUSE OF ACTION. - An action by a mortgagor to recover the amount of a deficiency judgment against one who had assumed the payment of the mortgage is not prematurely brought, where at the time of the commencement of the action the mortgagor had not paid the deficiency, since the right to reimbursement accrued after application of the proceeds of the sale.

[4] ID.—NOTE SECURED BY MORTGAGE—DEFENSES AGAINST ASSIGNEE.—A note secured by mortgage is not negotiable defenses set up in the answer to an action for fore available against the plaintiff assignee, as fully as have been against the original payee.

Id.

[1] APPEAL—JUDGMENT—FORECLOSURE OF MORTGAGE—DAMAGES.—An appeal from the judgment in an action for ure of a mortgage is frivolous and calls for the imposit ages, where the only question presented was that the p estopped from maintaining the action by reason of th he had commenced and dismissed three prior actions o note and mortgage, the evidence showing that such a dismissed by the clerk on the direction of the plaintiff settlement of the cause of action or anything purport decision on the merits.

Foster v. Branen, 55 Cal. Dec. 641.

[1] MORTGAGE—FORM OF DEED—INTENTION OF PART strument, though in the form of an absolute conveya tutes and will be treated as a mortgage, if in fact it w security for the performance of an obligation; but the one of intention of the parties and where the finding one party insisted upon the transfer of the property and extinguishment of his debt, and the other party yi demand, there is nothing in any way indicating an in the conveyance was given as security for the debt.

Bank v. Gesser, 55 Cal. Dec. 667.

V.

Mortgages and Trust Deeds

There are important distinctions between a Mortgage and a Trust Deed given to secure the payment of money. While in practical effect both work as security, there are certain rights and remedies under such instruments which are sharply distinguished.

A Mortgage under the laws of our State creates but a lien. The Mortgagee takes no title, no matter in what form the instrument is made. This is not true in all states. In many jurisdictions a Mortgage conveys a defeasible title to the Mortgagee. That is to say, he holds the legal title until the debt is paid. This gives him many higher rights than are conceded by the laws of the State of California. In this State he has a lien only, but if he take possession of the property he cannot be ejected until the debt be paid.

A Mortgagee, has under the ordinary form of Mortgage, a right of entry upon the premises to protect his security. Usually the covenants of the mortgage give him the right to prevent waste, to irrigate and the like if the Mortgagor neglects or refuses to do these things. He has not the right of entry by reason of any title, but only by reason of the contract between him and the Mortgagor; hence the Mortgagee cannot maintain or defend any suits relating to the title of the property. He can only enforce or defend his lien.

To acquire title to the property he must proceed to foreclose the equity of redemption of the Mortgagor by an action in the Superior Court. Then is set in motion the machinery which in time will transfer the title from the Mortgagor to a purchaser at the sale made by the Sheriff or a Commissioner appointed by the Court for the purpose of making sale when a Decree of Foreclosure has been entered. The law provides when such a suit is begun a lis pendens may be filed in the office of the County Recorder, giving notice of the action and description of the property and the names of the parties to the action, and from and after the date of the filing of such notice all persons dealing with the property are deemed to have notice of the action and they deal with it subject to the right of the plaintiff in the action. A plaintiff is not required to give heed to the claims of any person dealing with the

property after his notice has been filed, either purchasers, judgment creditors or other lien holders. His deed made to him, or to any purchaser, cuts off the rights of any parties dealing with the land subsequent to such public notice. However, the Mortgagee in bringing his action, if he desires to cut off all rights accruing subsequent to the date of his Mortgage must make careful inspection of the premises for notice of rights given by possession and make all persons claiming any right or title thereto parties defendant; otherwise they are not bound by the Decree of Foreclosure.

Under our laws strict foreclosures are permitted. That is to say, a Mortgage may contain a power of sale given to the Mortgagee under the terms of which he can, upon default in payment, proceed to advertise and sell the property, and this in lieu of a foreclosure by judicial process. This form of Mortgage is rarely used, and is practically obsolete. The power of sale in such a Mortgage given dies when action on the note secured by the Mortgage is barred by the Statute of Limitations. This is also true in the case of any pledge of property with a power of sale given. It is a common practice in the pledge of personal property to execute and deliver with the note a collateral agreement, pledging the personal property for the payment of the debt, and giving to the pledgeholder a power of sale in the event of nonpayment. This power of sale dies, as I have stated, when the statute has run against the principal obligation. This is for the reason that no actual title is transferred, but merely a lien given as security. This is not true, however, where the title is conveyed in trust under a Trust Deed made to a Trustee as security, for in such a case a title passes. There is no lien, strictly speaking, although it has the practical effect of a lien ranking in every respect with the lien created by a Mortgage or other contract, but in law it is of a higher character than a lien. The powers and authorities delegated by the Trust Deed do not expire until the object of the trust be accomplished. In other words, a debt is never barred by the Statute of Limitations, and the rights and remedies and powers given to the Trustee do not die until the debt be paid. It is true that the note secured by the Trust Deed cannot be sued upon when the time has run within which suit could be maintained upon the note, if it were not secured. In short, the Statute of Limitations may have run against any action on the note, yet the payment can be enforced by a sale under the terms of the Trust Deed, and if the property fails to bring an amount sufficient to pay the debt at the sale, suit can not be maintained on the note for any deficiency, if any, after the statute has run.

The Statute of Limitations is four years from and after the

date of the maturity of a promissory note, if it be executed within this State, and two years if it be executed outside the State. It must be borne in mind that the Statute of Limitations does not affect the debt. It merely is a bar to any suit at law upon the note itself after the expiration of the time limited by statute. It is very important to bear in mind that a note executed outside the State is barred two years after its maturity, and not in four years as in the case of one executed in the State. I can give no logical reason for this distinction, yet it is a statutory provision of this State, and has been upheld. We will take a very common case for illustration. You have a client, a resident of California, owning property in California, who applies to you for a loan. Pending the negotiations he is called to Chicago on business. To facilitate his business here you send to him the note and Mortgage which he executes in Chicago, and returns to you. Your right of action on that note is barred two years after its maturity.

As I have emphasized before, no debt is ever barred in law. It follows that even after the Statute of Limitations has run and the right of action in the Mortgagee is forever gone, the Mortgagor, or any one claiming under him, cannot quiet his title against the Mortgagee, his heirs or assigns, without paying the debt. This applies in cases where those deriving title from the Mortgagor have assumed the payment of the debt or in dealing with their immediate grantor have taken into consideration the debt in paying for the land and in proportionately reducing the purchase price.

It has been held, and very justly, that one dealing with land is entitled to rely upon the record as he finds it. That where he inspects the record and finds a Mortgage on the premises shown by its terms to be barred by the Statute of Limitations, and the Mortgagor has conveyed the title, and there is nothing in the chain of title to show that the subsequent grantees assumed the payment of the debt, he can ignore the Mortgage, and in my opinion, could maintain an action to quiet title against the Mortgagee to clear his record. He is permitted by law to assume that the debt has been paid. He cannot rely upon this assumption, however, if the title still remains in the Mortgagor or his heirs.

Trust Deeds to secure the payment of money are something of an anomaly in California. The Courts have repeatedly held that no specific trust in regard to real estate is valid in California unless it falls under some one of the classifications of the statute. These classifications will be discussed in the paper on trusts. Suffice it to say at this point that the statute does not define or permit in express terms or by implication such a form of security, but the Supreme Court has held that by reason of the long continued use of such

security affecting at this time untold millions in value, that they will be upheld and permitted as a rule of property despite the statutes and the oft repeated declaration that no specific trust in real estate is valid unless it fall under the statutory classification. All this upon the consideration that such a great amount of property would be affected by a contrary decision and so much loss incurred by people who have dealt in good faith, that the Courts will not at this time hold them invalid. The Court has said in so many words that were the question before them in the first instance where such deeds had been used it would pronounce them void. It may be taken therefore as well established law in this State that such conveyances will be upheld, but this attitude of the Court is very distinct notice to all that the powers given to a Trustee in such a deed must be strictly followed, and that the Trustee and the beneficiary under the trust will be held to the strictest account and in all respects held to the highest good faith, that the debtor may not suffer any undue imposition or deprivation.

I emphasize then this rule, that in foreclosure under such instruments, every possible notice and indulgence should be given to the debtor before sale is made, for when the hammer falls he is absolutely without right of redemption unless he can go into Court in an equitable action and show that the sale was fraudulent. He cannot in such an action question the right of the beneficiary to order a sale or the right of the Trustee to sell, or the price obtained at the sale, if, as a matter of fact, the proceedings have been fairly and honestly conducted. It is not incumbent upon the beneficiary or the Trustee to indulge his debtor after he is in default, but a Court of Equity will inquire carefully into all the steps, and if it find that the debtor has been oppressed they will lean toward him. The Courts will not enlarge any of the language or terms of such an instrument, and the powers and authority of the Trustee will be measured strictly by the terms of the Trust Deed. The recitals in the deed of all the preliminary steps leading up to the sale such as demands upon the debtor, the exercise of the option to declare the debt due, the notice, the manner and time and place of sale, and as to sale and the amount of bids received, are conclusive against the debtor, and those claiming under him if it be agreed in the instrument that they shall so be, but these recitals can be overcome if the debtor can show fraud or collusion, causing detriment to him.

As I have stated before, a Trustee under such an instrument takes a full title to the land, legal and equitable, but only for the purposes of the trust. Here we have another fiction of the law and an anomaly, for while it is true that the Trustee takes the full title,

yet a title is left in the grantor which is as of high order as that he had before he executed the deed, subject only to the right which he has conveyed to the Trustee, which right in its nature is analogous to a lien. Thus, after he has executed a Trust Deed, the property is subject to Homestead Declaration. He can convey it. It descends to his heirs; he can make mortgages or execute another Trust Deed to secure another debt, yet there is always in the Trustee such an interest as I may denominate a dormant title, which may at any instant of time be brought into full life if it be necessary for the Trustee to take any action to protect his estate. I think, therefore, that I am justified in saying, while it has not to my knowledge been so held by the Courts, that this dormant, legal and equitable title which rests in the Trustee comes into full vigor and life at the very instant the hammer falls at the Trustee's sale and passes from him at the same instant of time, for at that very moment it is necessary that the Trustee have the full legal and equitable title to the exclusion of his grantor for the purpose of passing such title to a purchaser at the sale.

That this would seem to be the true rule is borne out by the facts that a Trustee under such a Deed of Trust cannot maintain suit in ejectment against a trespasser upon the land. It could not sue to collect rents payable to its grantor, it could exercise no act of dominion over the property so long as the debtor be not in default. To say that one has a full title to property and yet cannot exercise these acts of dominion is to state an absurdity, so in my opinion it must be deemed that the Trustee's title only comes into full vigor and life when the necessity for the protection of the trust arises, and he is in no wise concerned with any other feature of the title.

It is better business policy to name as a Trustee a corporation authorized by law to act as Trustee. This for the reason that such companies continue in business and the creditor is relieved from any possibility of annoyance, trouble or expense in the case of a death or disability of an individual Trustee. Under the laws of this State no trust is allowed to fail for the want of a Trustee, and upon the death or removal or resignation of a Trustee of any specific trust, the trust falls into the Superior Court of the County and the judges thereof can upon proper petition name a successor in trust. This often causes expense and annoyance, and can be avoided by the employment of corporation Trustees. If it is desired, a successor or successors in trust can be provided for in such instruments by the simple agreement to the effect that upon the death, removal, refusal or inability to act of the Trustee named, that another Trustee may be selected by the parties, or by the holder of the note, and that

upon such appointment being certified, signed and acknowledged by the parties authorized to name the Trustee, and recorded in the Recorder's office, the title vested in the original Trustee will then vest in the successor named, but no method of the appointment of a Trustee, unless it be otherwise contracted in the Trust Deed, can be employed other than by petition to the Superior Court.

It is not necessary that the Trust Deed be formally accepted by the Trustee unless it is so formally contracted in the instrument. A performance of any of the duties imposed upon the Trustee, such as a sale of the property by the Trustee, implies his acceptance. Under the forms in common use in this community, however, it is provided that the trust shall not be operative until accepted by the Trustee on the face of the instrument. Where this is found, it is essential that the Trustee make formal acceptance, although I am inclined to believe that if the Trustee did in fact proceed and thus signify his acceptance, that the debtor would be bound if all the other proceedings were regular.

It is also a practice in this community to have the note certified by the Trustee as being the identical note secured by the Trust Deed. This is not a legal requirement, but it is certainly a safe and conservative business practice and one to be commended.

It is also the practice of Trust Companies to retain in their possession the Trust Deeds. This is a safe and commendable practice as they are thus less liable to loss or destruction, and are available when the Trustee comes to reconvey or to a foreclosure. The Trustee is entitled to the possession of the instrument, as he is the grantee. The matter of certification of the notes by the Trustee is of high importance, as will readily be suggested to your minds. It prevents an over issue of the notes where there are a number of them. One dealing with such notes is put upon notice of the terms of the Trust Deed, and he must in protection to himself read the instrument, and if he finds the statement therein that no note is deemed to be secured thereby which is not certified by the Trustee, and he is offered a note which is not so certified, he deals with it at his own peril.

It is often alleged that these Trust Deeds by reason of their provisions for strict foreclosure, whereby the equity of redemption is cut off, are oppressive and drastic. The answer to this is that in live communities, such as California, they operate not as instruments of oppression in the hands of grasping creditors, but as a distinct aid and benefit to the borrowing public. True, there may be isolated instances where men have suffered oppression and wrong at the hands of an usurous and grasping creditor, but I believe that it is your observance, as it has been mine, that in practically all cases

such securities have operated to the benefit of the borrower. When the creditor has a speedy remedy for the recovery of his money and the possession of the property, naturally he will loan larger sums upon the security. It is a well known fact that the Courts of our State are crowded and that one seeking to foreclose a Mortgage in many instances is required to wait from one to two years, in some cases three years, to recover the property. If this were the only means of recovery given the creditor, men would hesitate to loan their money. As it stands now, the lender is safe in taking junior liens, for he knows that he can recover by a speedy method of foreclosure. It is not too strong a statement to say that one of the greatest factors in the upbuilding and development of Southern California as a home district is directly traceable and due to the practice of employing Trust Deeds as security. Many, many thousands of instances can be pointed to in the City of Los Angeles alone where people have been enabled to secure homes under such a plan as this: A building company will place upon the property a first mortgage loan, sell the property subject to this lien and take back a Trust Deed for a part at least of the purchase price, giving the buyer an opportunity to pay for his home in installments. We have but to look about us in this city, with its miles upon miles of beautiful and comfortable homes, to see the wisdom of such a practice. Constantly attempts are made to prevail upon the Legislature to enact laws permitting a redempion from such sales. In my opinion, such legislation would be unwise and even foolish.

The power of sale given in a Trust Deed is the only remedy where the trust has not failed or the security become worthless. Such an instrument cannot be foreclosed as a Mortgage. However, there are certain forms of Trust Deeds usually used in the case of bond issues, giving alternative remedies, that is to say, power is given the Trustee to sell at public auction, thus effecting a strict foreclosure without right of redemption, or to proceed in a Court of Equity to foreclose by judicial process.

The notes secured by either a Trust Deed or Mortgage cannot be sued upon separately and apart from the Mortgage or Trust Deed so long as the security remains. However, if the title should fail, and the Mortgage or Trust Deed from any cause become valueless, then suit may be maintained upon the note, but where such is not the case, but one action can be maintained, and that is for foreclosure. In judicial foreclosures in case the property does not bring sufficient at the sale to pay the debt, a deficiency judgment may be entered without further suit against those defendants who are found personally liable for the debt. Where the property does not bring enough at a Trustee's sale to pay the debt, action

may then be maintained upon the note to recover the balance, provided the Statute of Limitations has not run.

Now as to the parties to such instruments. Broadly speaking, any person capable of contracting can make or receive a Mortgage. The same rules apply here to Mortgages as apply to grantors in deeds; thus one under legal disability such as minority, or one who is incompetent is incapable of contracting. Corporations are permitted to make Mortgages as freely as individuals. It is true that the statute prohibits a corporation from creating debts beyond its authorized capital stock, but this statutory prohibition does not make void Mortgages made in violation of it. The directors of a corporation are personally liable for debts created by them in excess of authorized capital stock, but where a corporation has received the proceeds of its notes, bonds or mortgages, it cannot plead that its act in creating the debt were not permitted by law. All Mortgages by a corporation must be made through its Board of Directors acting as such, and proper authority must be given by the Board of Directors to the officers executing the Mortgage. Yet, if these formalities be not observed, and the notes and Mortgage are executed in the corporate name and in otherwise proper form, and the corporation receives the proceeds, it is bound. It must be remembered in taking notes of a corporation, or even in extending credit to a corporation, that the stockholders are relieved from all personal liability at the end of three years from and after the date the debt is incurred.

Corporations, other than business corporations having a capital stock, can mortgage their property only upon authority given by the Superior Court. Certain statutory provisions are required. Public utility coporations such as water companies, street car companies and railroad companies are not permitted to mortgage certain of their properties except by authority of the Railroad Commission. Certain formalities are to be observed and certain proceedings had leading up to this permission. All corporations issuing bonds or other evidences of indebtedness, other than notes not to be offered to the public, must secure permission of the Corporation Commissioner under the terms of what is known as the Blue Sky Law. The rules applicable to such terms can be secured from the office of the Railroad Commission or the Corporation Commissioner, and will not be touched upon here, as there are constant changes made in such requirements, and it would serve no good end to discuss them here.

Guardians, administrators and executors can only mortgage the property of the estate by authority of the Probate Court, and such Mortgages must contain a recital of the authority so given. There

is no personal liability of the maker and no deficiency can be had against the property of the estate. Mortgages made upon the interest of minors must be made upon their separate interests, that is to say, each minor must be given the right to redeem his particular property or interest therein upon his payment of his proportionate amount of the debt. An administrator or executor or guardian cannot deal with the property of the estate for his own benefit. It is therefore incumbent upon one dealing with him to pay him the proceeds in his representative capacity, and not in his individual capacity.

A Mortgage made to joint payees, that is to say, where the Mortgage runs to John Smith and Mary Smith, may be satisfied by payment to either, and a release by either is good. This is also true in cases where it is expressly stated that they hold as joint tenants. A Mortgage should not be made to John Smith or Mary Smith, for the question then arises as to who furnished the funds, and to whom was the Mortgage delivered. Many times parties are put to much trouble and expense and annoyance to ascertain these facts, and it is a cardinal business rule that Mortgages should not so run. Mortgages made to Trustees should be made in their representative capacity, and recitals made of such capacity.

Any interest in property may be mortgaged or conveyed in trust. The same rules apply here as apply to deeds. A mere possibility of interest cannot be mortgaged. A Mortgage is valid which purports to cover property thereafter acquired. The rule as to delivery does not apply here, it being expressly contracted that such property shall come under the lien of the Mortgage when acquired.

Courts of Equity have held that such contracts are valid. They are especially applicable to the property of public service corporations. A deed purporting to convey after acquired property is void for want of delivery, but this rule is relaxed as regards Mortgages.

Any instrument, other than a conveyance in trust, is to be deemed a Mortgage if it is given to secure the payment of a debt. A deed given to secure a debt is a Mortgage, and here I desire to point out the illegality of a transaction such as this: One borrows money from another, giving to his creditor a deed of his property or depositing a deed to his creditor with a third party, with the understanding that if the debt is not paid when due, that the deed is to be delivered and the creditor deemed the owner of the property. Such a transaction is wholly void as a conveyance of the title. The debtor is not permitted by the laws of this State to waive his right of redemption by the instrument creating the debt. If he does

waive his right of redemption, it must be in a separate and later transaction. The law does not permit forfeiture of title upon non-payment of debt without legal process, foreclosing the debtor's equity of redemption. The deed is a Mortgage and must be foreclosed if the debtor seeks to secure the title. The Mortgagor himself cannot demand a foreclosure, but he has a right to maintain an equitable action for redemption, and if he redeems the Mortgage is no longer effective.

It is a common practice to avoid foreclosure for the Mortgagor and Mortgagee to agree that the Mortgagor will convey the property to the Mortgagee and take back from him an agreement to purchase within a stated time for the amount of debt and accrued interest. This is but another form of security, and does not accomplish the end intended, for the Mortgagee now holds a deed which he must foreclose instead of a Mortgage, and the debtor is yet entitled to his year of redemption. The Mortgagee has a poorer form of security than he had before, for he cannot in an action to foreclose recover attorney's fees. It is perfectly lawful for the parties to agree that the debtor will surrender his property **in full payment of the debt,** and the transaction must be **bona fide** and beyond question, and in full settlement of the debt. The deed should so express the intention. When the parties have once settled and the debt is extinguished, they can then deal as can any other individuals. When a deed is taken in satisfaction of the debt, the Mortgage should be released of record as the law does not presume it was the intent to merge the two interests. The intent to merge must appear.

The Mortgagee, his successors, personal representatives or assigns, can make satisfaction of the Mortgage as can any one of joint Mortgagees, but where the Mortgage runs to individuals severally and not jointly, the satisfaction must be made by all those as where the Mortgage is to John Smith and Mary Smith, one half each, both must join. An administrator, guardian, or executor cannot satisfy a Mortgage given by himself without permission of Court.

It is not necessary to set out in a Mortgage a copy of the notes, although it is good practice so to do. It is sufficient if it appear from the face of the instrument what the debt secured may be. A note may be dated before or after the date of the Mortgage and it is lawful to so draw the Mortgage to secure notes to be executed thereafter.

The note and Mortgage are read as one instrument. The note may pass without endorsement, but by assignment, and the assignment of the note carries all Mortgage security with it. One dealing with a note secured by a Mortgage is bound by every recital in the

Mortgage. A Mortage note or Trust Deed note is not negotiable. It is assignable and transferable, but does not fall under the protection of the law merchant. The law merchant applies only to negotiable paper, and a negotiable instrument is one certain in its terms, payable at a certain date in money, without any qualifications. Such an instrument in the hands of a purchaser in the ordinary course of business, in good faith and for value, before maturity and before notice of any infirmity, is clear of any equities existing between the maker and the payee. This is not true, however, with notes secured by Mortgage or a Trust Deed. Any one dealing with such a note at any time, must make inquiry to discover if there are any equities existing, such as a failure of the consideration, or as to any payments which may have been made and which do not appear upon the note. Thus, it is incumbent upon one purchasing a note to make inquiry of the maker if he has received the full consideration, if he has any defenses to an action on the note, or if he has made any payments on the debt which do not appear endorsed upon the note. If he stand mute and refuse to give the information, he is then barred from asserting any such equity or claims, for he has been given his opportunity to be heard and failed to disclose his rights. Where an assignment of note and Mortgage is taken the assignment should be recorded and the maker notified for in absence of notice he may make payments to the original holder.

Where a Mortgage is given for a certain sum, say for $1500.00, and but $1000.00 is advanced to the Mortgagor, and the Mortgagee subsequently sells the note, his assignee can collect only what has been advanced to the Mortgagor. He is not entitled to rely solely upon the statement of his assignor. Many cases of this class have arisen in this jurisdiction, mostly arising out of transactions where building loans are made, where assignees have suffered loss.

Too much stress cannot be laid upon the statement that one loaning money upon real property must look to the possession, and if any person is found in possession, must ascertain what rights he claims. It is not uncommon in this community at least, where a great deal of property is sold on contract, to find the contract holders living on the premises and nothing of record to disclose their rights. A Mortgagee takes subject to their rights and might eventually lose the entire amount of the loan, as the contract holder is not bound to pay any one but the holder of the legal title. He may pay out his entire contract obligation and hold the property as against a Mortgage made by his vendor. Many instances such as this have occurred in this community, and I point out that it is absolutely necessary for a Mortgagee to ascertain the rights of

parties in possession; otherwise he deals at his peril. Any evidence of occupancy is sufficient to put him upon inquiry.

In making loans in contemplation of the erection of a building, it is incumbent upon the Mortgagee to see that no labor has been performed upon the premises and that no material has been delivered thereon prior to the recordation of his Mortgage. I shall point out in a discussion of mechanics' liens that if he does not do this his Mortgage is subject to all liens for labor and material that may attach subsequently.

The laws which apply to renewals of Mortgages and extensions thereof, will, I am certain, be of peculiar interest to you. The maker and the payee may mutually agree upon an extension or renewal. Renewal is affected by the execution of new instruments, and if it be in fact simply security for the same debt is held to be a continuance of the former lien. The maker and the payee may agree to extend the due date of the note to any period of time. These agreements must be entered into by all parties concerned, that is, the maker, the payee and any endorser or guarantor on the note. The holder of the note cannot alone extend the Statute of Limitation by simply stating that he will extend the due date of the note; neither can the period of the Statute of Limitation be extended to the prejudice of a second lien holder without his consent. He is entitled to rely upon the records as he finds them at the time that he takes his second lien, and the subsequent act of the maker and payee of the first obligation cannot operate to his detriment without his consent, and, if the period of limitation be extended and foreclosure be not brought upon the first obligation before the expiration of the original period of limitation, the second lien holder takes precedence and has a first lien. I will give a simple illustration.

A, the Mortgagor, executes his note and Mortgage to B, payable in two years. The Statute of Limitation limiting the period within which A can sue upon his obligation is four years from the date of the maturity of the note, provided it be executed within this State, and two years if it be executed outside of the State. A then borrows on a second Mortgage from C. C examines the record and discovers the facts, thereupon he loans on a second Mortgage to C relying upon the record. Afterward A and B cannot make an agreement to extend the payment of the first Mortgage which will affect C without his consent. If A and B should extend the time of payment of the first Mortgage, we will say for three years as between them, a new period of limitation would begin, to-wit, at the last named maturity date, but as to C, he having not consented, the Statute of Limitation begins to run from the original

two year maturity date. If A therefore, after having given the extension does not begin his action to foreclose within the prescribed time from and after the original date of maturity he is barred so far as C is concerned, and when C forecloses his second Mortgage A cannot even set up a claim. It would be demurred out of Court on the ground that his action being barred as to the first obligation, he could not assert it as against C. It is therefore very important to bear this in mind, that when extension agreements are to be made, the record must be examined and the consent of all parties obtained. If it be impossible to secure the consent of the second lien holder, then do not extend the time of payment of your note so that it shall fall due at a time beyond the period of limitation reckoned from the original due date.

Renewals and extensions require a consideration to support them as does any other contract. Thus, the forbearance on the part of the Mortgagee to bring action to foreclose is a good consideration and will support an agreement of extension between the original Mortgagor or his successor in interest in the mortgaged property.

When a note is endorsed by the payee thereof in blank without any other contract, this liability is that of an endorser only, and he is entitled to notice of subsequent changes in the contract. If he be an accommodation endorser, he is in the same situation as the maker of the note, even if his endorsement appear on the back of the note. The contract of guarantee, however, is an entirely separate obligation from that incurred by the execution of the original note. Where endorsers guarantee the payment of the note their contract is a separate one and may be sued upon without suit being brought on the original obligation. Not so, however, if they be not guarantors. It must be borne in mind, and it is an important point, that a contract of guarantee must be founded upon a consideration. If it be entered into simultaneously with the original obligation which is guaranteed, that is sufficient consideration, and no other consideration is required. However, if the contract of guarantee be entered into after the creation of the first obligation, at any time later, it requires a separate consideration moving to the guarantor to support the contract.

Many Mortgages read that they are given to secure renewals of the original obligation. This contract is binding between the Mortgagor and the Mortgagee, but in my opinion, is no notice to any other person, and a second lien holder is not put upon notice of possible renewals. In other words, the contract for renewals does away with the necessity of execution of new papers, but the legal requirements are the same, and the doctrine of notice to third parties applies as if no mention had been made of it.

TORRENS LAW CHALLENGE

A judgment challenging the value of Torrens land certificates has just been handed down by Judge Works. The decision is one which will prove of vital interest to holders of Torrens certificates as it will have a far-reaching effect upon lands in this county.

The action arose following the sale of property by C. H. Bogart to Channing Follette, an attorney, with offices in the Security Building. Prior to the sale of the property Mr. Bogart made a deed to the Pacific Light and Power Company, giving the company permission to erect poles and high voltage wires across the land.

A few months after making this deed Mr. Bogart, with several of his neighbors, registered his property under the Torrens system, but made no mention of the power company's interest in the land, except through a notice published in newspapers. The purchaser brought suit against the power company to settle the question of ownership of this part of the land, relying on the Torrens certificate. The court held for the defendant.

Attorney Ray B. Schauer, for the plaintiff, stated that property owners have relied upon the provisions of the law, which do not require a purchaser to examine into the title back of the last certificate, as is now required under the recording system. He will appeal, saying that if the decision of Judge Works is upheld it will compel every purchaser of mortgages of land registered under the Torrens system to make an examination of the records to determine whether or not the owner of the certificate actually owns it.

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What the Bar Association Thinks of Torrens Lawyers

The Committee on Legal Ethics, of the Los Angeles Bar Association, published in the Los Angeles Daily Journal, the following opinion concerning a Torrens Title Lawyer, who practices law under the name of a fictitious Torrens Title Company, and also rendered an opinion concerning the professional ethics of attorneys who use these methods in securing legal business.

"ATTORNEY'S NAME AND DESIGNATION AS ATTORNEY APPEARING UPON LETTERHEAD OF A BUSINESS FIRM WHICH THEREON ADVERTISES ITS PRACTICE OF LAW.

"The letterhead in this instance, except for the omission of the manager's name, the attorney's name, office and phone number, was as follows:

'Mgr. Atty.'

PROPERTY OWNER'S GUIDE

Offices

Titles examined Building
Land appraised
Defects removed Los Angeles, Cal.,
Loans made
Certificates run down Phone
Legal advice on all law and equity matters
Escrows handled
We will save you money

Protective Association, 64 C. D. 253.

"In an opinion of this Committee of December 16, 1921, it was decided that it was unprofessional for an attorney to assume to practice law under a fictitious firm name, to which opinion reference is here made for a further discussion of the subject."

The Legal Ethics Committee of the Bar Association is composed of the following lawyers whose standing at the Bar gives additional weight to the opinion rendered by them:

Hubert T. Morrow
Jesse F. Waterman
Herbert J. Goudge
Elizabeth L. Kenney
Lucius K. Chase
Herbert Freston
Robert M. Fulton

The attorney who received the above professional rebuke at the hands of the Bar Association has been circularizing the county urging land owners to patronize his Torrens Title Company. He failed to state anywhere in the letter that he desires more registrations so that he can increase his annual income.

In these letters, among other statements equally unfounded, he says that the number of Torrens applications are rapidly growing. The following table compiled from the public records

Many Mortgages, and most of the Trust Deeds used in this community, provide for further advancements, the instrument to stand as security therefor. It is important to observe certain rules of law here. If the advancements to be made are optional with the payee, any advancements which he may make after he has received actual notice of intervening rights of second lien holders are subject to the rights of the second lien holders and become junior to their claims. This must be **actual** notice to him and not record notice, as he is not bound to search the records before he makes additional advances. This is not true when the advances to be made are **obligatory** upon the payee. In short, if he is under a legal obligation to make the advances in any event, then the law contemplates that the money has been actually paid over at the date of the instrument. No subsequent lien holder can take advantage of the fact that the money was not all paid at the date of delivery of the note. Thus, where it is obligatory upon the payee to make advances, as for instance in a building loan where a Mortgage is given, say for $5,000.00, and but $1,000.00 is advanced at the date of the Mortgage, the Mortgagee may pay out the balance from time to time without regard to notice, actual or constructive, from any subsequent lien holder.

A little point of interest to many loaners is this: that when an excessive rate of interest is charged upon interest, as for instance, where the note reads that the interest is 6 per cent per annum, payable annually, and if not so paid said interest shall thereafter bear interest at 12 per cent per annum, renders the entire contract for interest void, and no interest can be collected; for the Statutes prescribe that if the interest is not paid it shall thereafter bear the same rate of interest as the principal.

I come now to touch upon a very important topic; that is to say, the effect of the Torrens Act as regards Mortgage and Trust Deeds.

Under the recording act, as it at present exists, if unaffected by the Torrens Act, a Mortgagee places his Mortgage with the recorder of record, retaining the note as evidence of the indebtedness. The Mortgage is transcribed in full, carefully compared and certified by the recorder, thus obtaining a permanent, legible public record of the document, a record which can be produced in any proceeding involving the ownership of the security or the title to the property thus incumbered and from which copies can be made and certified to be used for a similar purpose. The document is returned to the Mortgagee who has the convenience of possession of the original instrument for reference at any time when required and, in the improbable event of the destruction of the record itself,

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Offices

Titles examined Building
Land appraised
Defects removed Los Angeles, Cal.,
Loans made
Certificates run down Phone
Legal advice on all law and equity matters
Escrows handled
We will save you money
Abstracts made
Estates probated
See us first.'

"Upon complaint to this Bar Association, the above letterhead was apparently discarded, the firm's name changed, and the following, except for similar exceptions above noted, substituted for the firm's use, viz.:

"SECURE A TORRENS TITLE —IT'S A STATE GUARANTEE—BEST TITLE IN THE WORLD.

STATE TORRENS TITLE COMPANY

Estates probated
Real estate and loans
Titles quieted Chief Counsel
Abstracts escrows
Legal advice
Torrens titles
General Agents Building
Los Angeles, Calif. Phone

"The attorney acted as counsel for the above institutions and knowingly permitted the use of his name upon such letterheads. He thereby violated the Canons of Legal Ethics, and his conduct was unprofessional. Each of said institutions by its respective letterhead advertised the practice of law, whereas the practice of law by other than natural persons is prohibited by the Law of this State.

People etc. ex rel. Lawyers' Institute of San Diego v. Merchants Protective Association, 64 C. D. 253.

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In these letters, among other statements equally unfounded, he says that the number of Torrens applications are rapidly growing. The following table compiled from the public records of Los Angeles County shows year by year the total number of petitions filed and the total number of parcels of land included in all the petitions. It will be seen that seventy-three—the high water mark—were filed in 1916 and that year by year the petitions are growing less and less as are the parcels of property being placed under the Torrens Law. No deduction is made in the table for parcels withdrawn from the petitions before they were registered.

Petitions Filed 1916 to 1922 Inclusive.

Year	Total Petitions Filed	Total Parcels of Land Included in Petitions.
1916	73	1099
1917	61	2076
1918	69	1685
1919	71	1547
1920	35	618
1921	23	353
1922	21	271

At the present time the use of the Torrens Law in Los Angeles County is comparatively negligible. This in spite of the fact that during the past few years real estate transactions have been more active than at any other time in the history of California.

It would seem that the property owners have not the confidence in the Torrens system that the Torrens lawyers would wish them to have.

Reprint from Financial-Insurance News of Feb. 3, 1923

TORRENS LAW CHALLENGE

A judgment challenging the value of Torrens land certificates has just been handed down by Judge Wo[illegible] back of the last certificate required under th[illegible]

Many Mortgages, and most of the Trust Deeds used in this community, provide for further advancements, the instrument to stand as security therefor. It is important to observe certain rules of law here. If the advancements to be made are optional with the payee, any advancements which he may make after he has received actual notice of intervening rights of second lien holders are subject to the rights of the second lien holders and become junior to their claims. This must be actual notice to him and not record notice, as he is not bound to search the records before he makes additional advances. This is not true when the advances to be made are obligatory upon the payee. In short, if he is under a legal obligation to make the advances in any event, then the law contemplates that the money has been actually paid over at the date of the instrument. No subsequent lien holder can take advantage of the fact that the money was not all paid at the date of delivery of the note. Thus, where it is obligatory upon the payee to make advances, as for instance in a building loan where a Mortgage is given, say for $5,000.00, and but $1,000.00 is advanced at the date of the Mortgage, the Mortgagee may pay out the balance from time to time without regard to notice, actual or constructive, from any subsequent lien holder.

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Challenge Torrens Law

LA Journal—8/2/19

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FINANCIAL NEWS

LOS ANGELES, CAL., FEBRUARY 3, 1917 FIVE CENTS

Object of Torrens Law Defeated

The object of the Torrens law is to provide a system of land titles by which the true condition of the title to real estate will be evidenced by a page of a book in the office of the registrar of titles, which may be relied upon by anyone dealing with the property without further examination or investigation. This page in the registrar's book is called the certificate of title.

The Torrens law does not, and cannot, provide a system of land titles whereby the property owner can safely rely upon the certificate of title; hence, it fails in its object. The person intending to deal with a parcel of land must make an examination and investigation, either on his own behalf or through some competent person, to ascertain the true condition of the title. The necessity for this precaution is in no way eliminated by the Torrens law; it is asserted by persons who are familiar with the operation of the [illegible] did not know existed, at the time of the purchase.

Second. When the owner of real property goes into bankruptcy there is no way by which this important fact appears upon the registrar's certificate, and a purchaser who relies upon this certificate would receive no title, or a title which could be set aside and invalidated because the owner, who had become bankrupt, no longer held title to the property. The title would be vested in the trustee in bankruptcy, who cannot convey the property without the approval of the federal court, and one who purchases the property of a bankrupt from a person other than the trustee receives no title.

Third. A judgment registering property under the Torrens system is final and conclusive only as to those persons who had notice of the proceeding and were given their day in court. All persons who had an interest in the property as shown by the

M'WILLIAM TO LEAVE SECURITY TRUST & SAVINGS

E. G. McWilliam, for the past two years manager of the department of publicity and new business of the Security Trust and Savings Bank, has accepted a position with the Guaranty Trust Company of New York city, and will leave Los Angeles in the near future to take up his work. Mr. McWilliam is to become assistant to Vice President Stetson of the Guaranty Trust Company in the banks and bankers' division of the institution.

The Guarnty Trust Company is the largest trust company in the United States, having resources of over five hundred millions of dollars.

Before coming to Los Angeles Mr. McWilliam was for three years secretary of the savings bank section of the American Bankers' Association, and for fourteen years prior to that connected with the Irving Savings Bank of New York, going to that institution from the Dime Savings Bank of Brooklyn, where he began his banking experience.

Mr. McWilliam is now president of

ed States National Bank of Los Angeles

Your Business

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The last decision says: "The evidence in the matter now before the commission does not show any essential change in the affairs of this corporation, as outlined in the commission's decision of January 10. The company will be expected to proceed to collect funds through the medium of an assessment, and thereafer the commission will be in a position to entertain further applications relative to the financing of the company's properties."

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MADERA GAS COMPANY

The Railroad Commission has issued an order authorizing the Madera Gas Company, which supplies gas in Madera, Madera county, to issue $11,292 of its common capital stock at not less than 80 per cent net to the company, and $23,000 of 6 per

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retains the original which can be again recorded if thought desirable or necessary. The holder of a Trust Deed note procures the record of the Deed of Trust which is either returned to him or to the Trustee, thus securing also a permanent record as well as the custody or the right of convenient access to inspect the original.

Under the registration system, after property has been first registered, an original Mortgage is left with the registrar and filed under a document number in his office. It is not transcribed. Only a brief notation of its contents is endorsed upon the certificate of title. No permanent record is made. The Mortgagee has neither the original document nor can he be certain that the original will be accessible. His only security would be to procure a copy showing filing endorsements certified by the registrar. In the event of loss of the original from any cause such a copy would be treated as a duplicate, but its exact status is not defined by the act. Under this plan the Mortgagee can at the best secure nothing more than a certified copy of an instrument of which there is no permanent record, and which, even if it be in the registrar's office, might be hopelessly misplaced in the event that the system comes into general use, as the task of filing several hundred documents a day would be a very difficult undertaking and errors would necessarily occur.

Consideration should also be given to the fact that registration under the terms of the Act adopted in November, 1914, is ordinarily based upon an application by the owner setting forth only that he and his predecessors in interest have owned the land and have been in actual and adverse possession of the same and paid all taxes and assessments levied thereon for more than five years preceding the application. Where this allegation is made in the petition, no abstract or proof of the early title is required and if these facts be alleged and shown, as they ordinarily are, by the testimony of one witness, no investigation is made at all as to the antecedent title. In accordance with the theory of the act, as will be hereinafter shown, a decree based upon such an application and showing is binding upon all the world and terminates without other or further notice any valid existing easement or adverse right or claim.

The original application made by the owner of the fee title must set forth, among other things, whether the property is subject to any easement, lien or incumbrance, and, if so, the name and post office address, if known, of each holder; the nature and amount of the same and book and page of record, if recorded. While this requirement is found in the law there is no method provided to enforce compliance, because, as above stated, in the ordinary application, no investigation is made of the title beyond ascertaining

possession and payment of taxes for the period of five years preceding, each petition containing a statement of possession for the prescribed period, so that no investigation is made by the Court as to title prior to that time.

The Act further provides that while the fee simple title must be first registered, the fact that land is encumbered is no objection to bringing it under the system; that all liens must be noted upon the certificate of title issued by the registrar and that the title so certified by him shall be subject only to the liens therein set out except as otherwise provided in the Act; also that filing of the application in the county clerk's office shall be sufficient notice to all **subsequent purchasers or incumbrancers.** When satisfied of the sufficiency of the application, the Court orders issuance of a notice which shall be directed to all parties appearing by the petition and abstract, or by the report of the examiner of titles, to have any interest in the land or any part thereof and setting forth, among other matters, the names of all applicants, description of the land involved and a statement of the filing of the petition for registration "which notice shall direct all whom it may concern to appear and answer said petition" within a specified time. This notice must be published four weeks, and, in addition, personal service must be had upon all parties not joined in the petition who appear to be interested in the fee of the property, all occupants named in the petition and the husband and wife of married applicant. Personal service must also be made owners of all adjacent lands and in certain cases upon the authorities of the municipality or county. No service of any notice upon a Mortgagee or the holder of any incumbrance or lien upon the premises is required, or provided for, although the decree must determine the rights of these parties. Apparently it is contemplated that this be done without their being brought into the proceedings. After service is complete the Court after hearing enters its decree and also in such manner as to show their relative priority all Mortgages, liens or incumbrances of any kind. A certified copy of this decree is deposited with the registrar who thereupon issued his certificate bringing the land formally under the Act, setting forth in substance the finding of the decree as to vesting of title, nature, amount and order of priority of liens, and the effect of entry of the decree is thus defined in the Act:

"Sec. 16 . A decree of the Court ordering registration shall be in the nature of a decree in rem, shall forever quiet the title to the land therein ordered registered and shall be final and conclusive as against the rights of all persons, known and unknown, to assert any estate, interest, claim, lien or demand of any kind or nature whatsoever, against the land so ordered registered or any part thereof, except only as in this Act provided."

The Act excepts from the effect of registration and provides that the title registered shall be subject, in addition to the matters set forth in the decree, to any lease, verbal or otherwise for a period not exceeding a year, to certain easements or exceptions for highway purposes, to any right of way or other easement created within a year before the issuance of the certificate, to any tax or special assessment for which a sale of the land has not been made at the date of the certificate of title, to the right of action allowed by the Act (which is for one year following the first registration) and to liens, claims or rights arising under the laws of the United States which cannot be required to be shown in a State record. The registrar, when copy of the decree ordering registration is filed with him, issues in duplicate certificate of title in accordance therewith, retaining the original in his office and delivering the duplicate to the owner. Thereafter no voluntary transaction can affect registered land unless the following requirements be complied with. The instrument offered for filing must have noted upon it a statement that the land sought to be affected is registered, the name of the registered owner and number or numbers of last certificate of registration, otherwise such instrument must not be filed, or, if filed, is of no effect. In addition every voluntary instrument must contain or have endorsed upon it the name, residence and postoffice address of every person who acquires or claims an interest under such instrument. Papers thus prepared and presented to the registrar will not then be filed by him unless there be also presented the owner's duplicate certificate of title in order that the same endorsement which is made upon the original may be made upon the copy. It therefore follows that a Mortgagee holding a Mortgage upon registered land could not assign the same unless he obtained from the Mortgagor and presented with the assignment the owner's duplicate certificate of registration. Moreover, if the Mortgagee sought either to assign or release a Mortgage by an attorney-in-fact, in addition to the other requirements, the power of attorney must not only have been filed with the registrar, but a notation thereof must have been entered not only upon the original certificate, but also upon the duplicate certificate which the owner has in his possession. No method is provided for preserving in the registrar's office a record of the fact that endorsements required by law to be made upon the duplicate certificate have been so made, the Act simply providing that such action must be taken.

The duplicate certificate of title in the possession of the owner of the property is his only evidence of ownership, as he would have no deed, except possibly a certified copy of one on file. Either the Mortgagee must obtain this from the Mortgagor and retain it in his

possession or he will be subject to great annoyance in executing any papers affecting the Mortgage. Neither a release, nor assignment, even if executed in person and complying otherwise with all of the requirements of the Act would be received for filing by the registrar, nor would they be entered upon the register by him without production of the duplicate certificate of title, and until so entered they are of no effect even though the consideration therefor has been paid. Even a deed between the parties, until filed and registered, takes effect only as a contract to convey. The status of a Mortgagee of unregistered property, after an application to register the title thereto has been filed, is difficult to determine. As above noted, filing the application has the effect of a lis pendens so far as subsequent incumbrancers are concerned. No provision is made as to prior incumbrancers. It is provided that incumbrances upon registered land may be enforced as now, or hereafter, provided by law and that the laws referring to release or satisfactions or mortgages or foreclosures of Mortgages shall apply to Mortgages upon registered land except that until notice of the pendency of a suit to foreclose is filed in the registrar's office, and noted upon the certificate of title the filing of such action to foreclose is not notice to any person dealing with the land. Apparently this makes it impossible to foreclose a Mortgage upon land upon which an application for registration has been filed and no decree entered or certificate issued. In preparing the Act no thought seems to have been given to the status of the title during the period intervening between filing the application and entry of the decree. The minimum period necessary for this is at least sixty days and more frequently more than ninety days. Reference has already been made to the necessity of producing the owner's certificate at every transaction. If it be lost or misplaced a copy cannot be obtained, but application must be made to the Court and proof produced and a decree authorizing the issuance of a duplicate rendered before the registrar is authorized to issue this document. If the registered owner of the property changes his or her name by reason of marriage, divorce or other legal proceeding application is required to be made to Court and a decree and new certificate must be issued in the same manner as above indicated before any further notations can be made upon the original register.

No person may bring an action to assert any interest or right in registered land or any lien or demand upon the same adverse to the interest certified after one year has elapsed following first registration. Just what effect this might have upon the rights of a Mortgagee under a Mortgage executed prior to registration is not clear, but whether executed prior to registration or not it will doubt-

less be subject afterward to the Act if the Mortgagee is served with notice of the proceedings.

If a Mortgagee or holder of a Trust Deed note should, through the excess of caution of the applicant, be served with a notice in proceedings to register the title it would be absolutely necessary for him to appear and plead to protect his interests. He cannot be heard to object to registration, but if brought into the suit or voluntarily appearing he can endeavor to protect his rights and claims. Registration may be had not only without his knowledge, but also against his protest and in view of the specific provisions, oft repeated in the Act, that the certificate of title issued by the registrar defines the rights of the parties, it is of the utmost importance to the creditor that he take every precaution to see that his lien is correctly set forth in the certificate which forms the title. Whether he appears or not, the Act provides that his security, whether represented by Mortgage or Trust Deed shall, after registration, be held by him subject in all respects to the terms of the registration Act the same as though it had been executed after the title had been registered.

This involves the employment of an attorney at the Mortgagee's expense, as under the present form of Mortgage this could not be charged to the owner of the property. The importance of this appearance must not be lost sight of; in fact, it would seem that a Mortgagee must constantly be on the lookout, as, if there be no legal requirement to notify him, registration might be effected without his knowledge and if the Act be valid and his interest be incorrectly stated either as to amount or order of preference with respect to other liens, he would be absolutely precluded after the lapse of one year from asserting any other interest with respect to the land than that certified in the decree. Some recent occurrences amply justify this conclusion and indicate that the owner should also be alert. In one case a decree entered since January 1st, 1916, omitted a $5,000.00 Mortgage which was shown by the pleadings but not set forth in the decree, until it had been corrected subsequent to its first entry. In another case the verified answer of the Mortgagee showed that a payment of $500.00 had been made upon a Mortgage set forth as an incumbrance. The decree, however, followed the application and the decree and certificate of title set forth a Mortgage for the full original sum as a lien upon the premises. It must not be forgotten also that tax titles, if founded upon a deed by the State of California, can be registered simply upon application without further proof. Merely to set forth this fact is to show upon what an unsubstantial foundation a registered title may rest.

With respect to the usual form of Deed of Trust now commonly employed to secure loans, the Act prohibits a sale by the Trustee. He must go into Court and obtain authority by an order of Court to make the sale, and, apparently, when the sale has been made and the trustee's deed issued, if the owner's duplicate certificate is not available the purchaser must again go into Court and make proof of his rights in order to procure the issuance of a certificate showing title in him.

The Act provides in reality a new form of conveyancing. It is extremely technical, as appears from some of the requirements set forth herein and differs in almost every important particular from the usual method of transferring or incumbering titles. It has never been judicially construed. The effect of failure to comply with its many requirements can only be surmised. Until it has been construed by the proper authorities this uncertainty must continue. Matters which in ordinary conveyancing would be deemed immaterial are set forth as requirements, or as things which must be done in the same manner as the most important phases of the plan. Ultimately, perhaps through a series of judicial decisions, it may be determined what is important and what may be ignored. At the present time there is no course open but to insist upon literal compliance with every provision however burdensome. It is an ambitious plan going beyond the State Courts and seeking to prescribe a course of action even for proceedings in the Federal Courts affecting registered land. It assumes that no other provision of law may be superior, whereas the fact remains that franchise taxes upon corporations prescribed by the State Constitution are a lien upon their property regardless of the provisions of this Act; that for failure to pay such lien in the manner prescribed the corporation will not only forfeit its charter, but the lien will remain. It also necessarily follows that the provisions of the public utility act governing the transactions of certain classes of corporations will control as to conveyances and incumbrances by them and that these and many other matters will not and cannot be brought to the attention of the registrar who is not even expected to examine the proceedings taken in an action in Court in his own county. He simply registers upon production of the decree subject to the right proceedings taken in an action in Court in his own county.

There is a provision of the Act that, after registration, every lien and encumbrance on the land shall be deemed to be subject to any subsequent amendments or alterations of the Act, and that any one acquiring a lien shall be deemed to have agreed to this. This means that if you take a Mortgage on land registered under this Act, and if it be held to be law, you are held to have agreed that

your contract may be altered by any subsequent amendments or alterations of the Act. A rather startling innovation, I should say, and one of particular interest to one who contemplates loaning money on the security of land registered under the Act.

In closing I will say that liens in this State may be created upon land by contract other than Mortgage. Usually there is no personal obligation, the land alone being held. As for example, where contracts are entered into for the furnishing of water for irrigation or the like, it is usually provided in the contract that the annual charge shall be a lien upon the land. These liens may be enforced against the land, but it has been held that no owner, in the absence of an express personal agreement to pay, is personally liable.

I would urge these points upon your attention. In taking a Mortgage, ascertain whether or not the property be a homestead. If so, husband and wife must join in the note and Mortgage. Make the check for the proceeds payable to both. Make inspection of the premises and ascertain if any other than the Mortgagor is in possession and claiming rights. If the property stands in the husband's name alone, and it be not homestead, it is not necessary that the wife join, for if it be his separate property she has no interest, and if it be community property he has the entire control of it. If the title is acquired by the wife since May 19, 1889, and the property be not homestead, it is not necessary that the husband join, for it is presumed to be her separate property, and this presumption is final and conclusive in favor of an encumbrancer or purchaser in good faith, and for value. When she has dealt with the property the gate is absolutely closed. In granting extensions of the original obligation secure the consent of all parties including subsequent encumbrancers. In purchasing a Mortgage make inquiry of the maker as to any equities existing and record your assignment and in every case have the title examined that you may know of any possible subsequent claims or liens. When you have done these things the law protects you because you are vigilant. If you ignore them the law imposes upon you the penalty of your negligence. Remember that if you take a Mortgage on land registered under the Torrens Act you have agreed that your contract may be changed in any particular at any time it is seen fit to amend or alter the Act.

VI.

Homestead Exemptions

It has always been the policy of the law to protect and save to the family a place for a home, and in this State the law is very indulgent in this matter. In many of the states of the Union the land becomes a homestead simply by the fact that it is occupied as a home—a place of residence for the family. Where such law prevails a removal from one residence to another has the effect to destroy the homestead character of the property left and such character immediately attaches to the new premises occupied. This is not true in this State. To impress real estate with the character of a homestead in California, it is necessary to follow the statutory provisions. A Declaration of Homestead must be executed and filed in the recorder's office before the property becomes a homestead, and this property remains the homestead of the claimant until conveyed or abandoned by an instrument of abandonment, executed and recorded in the recorder's office of the county where the original Declaration was filed.

The homestead interest in land is the offspring of the Statute in this State, and is not an inherent right. This interest is created by Statute for the humane and benevolent purpose of furnishing a home for the family, and the law makes the home a sanctuary for the family, safe from attacking creditors, and safe from the danger of a conveyance by one or the other of the spouses alone. The power of a stranger to enter as a tenant in common, to interfere with the occupancy, enjoyment and control by the homestead claimants, and his power to have the land partitioned or sold if it could not be divided, is inconsistent with the very nature of a homestead, and is violative of the very purpose for which the homestead is created; hence it follows that no conveyance of the homestead can be made unless the deed is joined in by both husband and wife, if the claimant be married. To hold that one could convey an interest to a stranger without the consent of the other would undermine the very principle of the protection of the home.

The very liberal homestead exemptions under the California laws have been often the subject of criticism by the unthinking. At first blush it would appear somewhat unjust to permit a man

to sequestrate from his creditors by this means a very considerable amount of his property. It is true that in some instances the exercise of this exemption right works a hardship upon the creditor. On the other hand, California is a new, growing community, the country is rich, the per capita wealth is large, money is ordinarily easy, and credits are correspondingly extended. There is a reason that the homestead exemption in California should be larger than in other communities. It is but one factor in the growth, wealth and prosperity of the State. It has been my personal observation that more liberal credits are given in California, where the exemptions of real and personal property from execution are large, than in states allowing small exemptions. In some states the exemption of a married couple is but $300.00, with some trifling exemptions as to household furniture, etc. In such communities credits are limited. The liberal exemption of real and personal property in California is but another example of the liberality of her people and her laws.

The Statute prescribes the mode of declaring a homestead. In order to select a homestead, the husband or other head of the family, or in case the husband has not made such declaration, the wife, must execute and **acknowledge** in the same manner as a grant of real property is **acknowledged,** a Declaration of Homestead, and file the same for record. It will be observed that one of the requirements is that it must be acknowledged, thus differing from a deed which is valid although not acknowledged. A declaration of homestead is only effective from the date of its recordation. The Torrens Act does not provide for the creation of a homestead, but does assert that after registration that no instrument recorded in the recorder's office shall be deemed to impart notice of its contents. I am unable to see how, if the Torrens Act be law, how land may be impressed with a homestead after it has been registered. The Declaration must contain a statement showing that the person making it is the head of a family, and if the claimant be married, the name of the spouse, or when the Declaration is made by the wife, it must show that her husband has not made such declaration, and that she therefore makes the Declaration for their joint benefit. A statement that the person making it is residing on the premises and claims them as a homestead. It must also contain a description of the premises, and an estimate of their actual cash value. All of these requirements are vital, and a Homestead Declaration which does not contain these statements is void. A statement as to "cost value" has been held to be insufficient. This illustrates the point advanced that the Statute must be strictly followed.

It is absolutely essential that the claimant reside upon the premises at the time the Declaration is made. The description of the premises must be sufficient to identify the very property claimed.

Both in the Constitution and the Statutes the word "Homestead" is used in its popular sense, and as the Statutes are remedial they should be liberally construed, but being a creature of the Statutes, the Statute must be strictly followed in the matter of the Declaration.

The homestead consists of the dwelling house in which the claimant resides, and the land on which it is situated, selected in the statutory method.

The homestead is not limited by the law, except as to value of the exemption. Thus, a homestead may be declared upon land of any value, and of any extent, so long as the premises are used for residential purposes. If the premises claimed in addition to being lived upon are also used as a place of business by the family, and this frequently happens, they do not therefore necessarily cease to be homestead property. Thus, where the house is partitioned and one half was used for a millinery store, conducted by the wife, and also for living purposes of the family, and the other half was occupied as a tinshop, conducted by the husband, it was held that the property did not lose its homestead character. Where a building was enlarged after the Declaration was filed and used as a hotel, and the claimant continued to reside on the premises, it was held they did not lose their homestead character. It must be remembered, however, that the hotel business must be incidental to the primary use, that is to say, to the use as a residence. Where a building had been used for business purposes for many years before the Declaration was filed, and the business was discontinued after the filing and the building thereafter used as a dwelling, it was held that premises remained a homestead. Where one is the owner of a flat building and lives in one of the flats, he may declare a homestead on the whole building and the land, even where there are separate entrances to the building, provided his residence there be in good faith, solely for the purposes of a home, and not incidental to the business of conducting an apartment house. Roomers and lodgers may be taken, and yet if the claimant resides on the premises they remain a homestead. An occupancy by a tenant, however, is not sufficient. The residence must be bona fide and the main purpose to which the property is devoted. Where the premises are occupied by two families, the homestead can only apply to one. The claimant may lease a portion of the building and yet retain his

homestead. A second building may be erected on the premises after the Declaration and used for other purposes, yet if the claimant continue to reside on the premises it is still a homestead. The test would seem to be whether the business is incidental to the residence, or the residence is merely incidental to the business. In the former case, the main purpose being for a residence, there is no question but that the homestead would be valid. However, if the main purpose be to conduct a business of any kind on the place, and the residence be merely incidental thereto, the homestead character would cease.

The right of homestead is not confined to any particular title or interest. Any equitable interest of the claimant may be so impressed, as where one holds a contract for purchase, or a lease of the property, his Homestead Declaration would attach to such interest to the extent that his interest would be protected as against creditors. A garden attached to the land may be included in Homesead Declaration. More than one lot may be selected where they are all used legitimately and **bona fide** for living purposes. Where part of the land described in the Homestead Declaration is actually used and appropriated as a home for the family, the remainder not so used and appropriated, forms no part of the homestead.

The physical fact of claimant's occupancy as well as the intention with which he occupies, are to be taken into consideration. It is as I have stated, the principal use to which the property is put, and not the quantity which governs. A homestead may be filed on a mining location. Where the Homestead Declaration covers the whole of the farm and the major portion of the farm was used for stock grazing, the fact that the farmer took in other stock to pasture for a consideration was held not to destroy the homestead. When the homestead comes to be set apart under the statutory proceedings which I shall recite later, then it is limited in quantity to the actual dwelling house, necessary outbuildings and a sufficient amount only of the land necessary for the claimant for living purposes. But this must not be confounded with the right to occupy any amount of property as a homestead primarily.

Homesteads may be selected and claimed of not exceeding $5,000.00 in value by any head of a family, and of not exceeding $1,000.00 in value by any other person. Here again must be distinguished that these values mean the **exemption** value if the homestead be attacked, and not the value of the property primarily. There is no limit to the value on property which may be made a homestead. The limit is only upon the exemption.

The phrase, "head of a family," is defined by the Statute to include within its meaning—

1. The husband, when the claimant is a married person.

2. Every person who has residing on the premises with him or her, and under his or her care and maintenance, either his or her minor child or minor grandchild or the minor child of his or her deceased wife or husband, a minor brother or sister, or the minor child of a deceased brother or sister, a father, mother, grandfather or grandmother, the father, mother, grandfather or grandmother of a deceased wife or husband, an unmarried sister or any other relatives who have attained the age of majority and are unable to take care of or support themselves.

A homestead cannot be carved out of property held in joint tenancy, or tenancy in common, unless the joint tenancy or tenancy in common be between husband and wife. While the law forbids the carving out of the homestead on an undivided interest in the land for obvious reasons, for where there are two tenants in common on the land, each has the right of occupancy, yet the reason for this rule ceases when applied to joint tenants, or tenants in common, who are husband and wife, as though each owns a half of the home, their Declaration of Homestead is but a protection for that very home. Land held in such tenancy can be created a homestead by the declaration of the husband and wife, or the wife alone, but not by the husband alone.

If the claimant be married, the homestead may be selected from the community property, or the separate property of the husband, or with the consent of the wife, from her separate property. Thus it will be seen that a Declaration of Homestead made by the husband upon his wife's separate property without her joining in the declaration is void. The wife, however, may declare a homestead on her own separate property for the benefit of herself and husband, upon the community property, or upon her husband's separate property without the husband joining in the Declaration, and may be declared on property which is both community or separate, but without her consent the husband cannot create a homestead on the separate property of the wife.

The homestead is exempt from execution or forced sale except in cases where a judgment was obtained before the Declaration of Homestead was filed for record, and which constituted a lien upon the premises at the time the Declaration was made, and except on debts secured by mechanics, contractors, sub-contractors, artisans, architects, builders, laborers of every class, material men or vendors liens upon the premises, and except debts secured by Mortgages or Trust Deeds upon the premises, executed and ac-

knowledged by the husband and wife, and secured by Mortgages or Trust Deeds on the premises, executed and recorded before the Declaration of Homestead was filed for record. In any other case where an execution has been issued for the enforcement of a judgment and the execution is levied upon the homestead, the judgment creditor may at any time within 60 days thereafter apply to the Superior Court of the county in which the homestead is situated for the appointment of persons to appraise the value thereof, and if such application shall not be made within 60 days after the levy of such execution, the lien of the execution ceases at the expiration of such period, and no execution based upon the same judgment can be thereafter levied upon the homestead. The application made to the Court must be verified and show the fact that an execution has been levied upon the homestead within 60 days prior to the filing of said petition; must contain a description of the homestead and the name of the claimant; a statement that the value of the homestead exceeds the amount of the homestead exemption, and that no previous execution arising out of the same judgment has been levied upon said homestead. Within 90 days from the date of filing the petition a copy thereof with a notice of the time and place of hearing must be served upon the claimant or his attorney, at least two days before the hearing, and if such notice shall not be so served the lien of execution ceases at the expiration of said period of 90 days, and no execution based upon the same judgment can be thereafter levied upon the homestead. At the hearing the Judge may upon proof of the service of the copy of the petition and notice and of the facts stated in the petition appoint three disinterested residents of the county to appraise the value of the homestead. These persons are sworn; they are required to view the premises and appraise the value thereof, and, if the appraised value exceeds the homestead exemption, they must determine whether the land claimed can be divided without material injury. They must make their report within 15 days after their appointment, to the Judge—a report in writing which must show the appraised value and their determination upon the matter of a division of the land claimed. If, from the report it appears that the land claimed can be divided without material injury, the Court will by order direct the appraisers to set off to the claimant so much land, including the residence, as will amount in value to the homestead exemption, and the execution can then be enforced against the remainder of the land. If, however, it appears to the Judge from the report that the land claimed exceeds in value the amount of the homestead exemption, and that it cannot be divided, he will make an order

directing the sale of the whole property under the execution, and at such sale no bid must be received unless it exceeds the amount of the homestead exemption. If the sale is made, the proceeds thereof to the amount of the homestead exemption must be paid to the claimant and the balance applied to the satisfaction of the execution. The money paid to the claimant is entitled for the period of six months thereafter to the same protection against legal process and the voluntary disposition of the husband which the law gives to the homestead. In other words, for six months the cash received by the claimant is protected as was the land before the sale. If there be a mortgage on the property at the time of the execution sale, this mortgage must first be paid before the claimant is paid. Thus, if the homestead covers property worth $15,000, there be a mortgage on the premises for $5,000, and an execution creditor proceeds against the property and has it sold, the mortgagee is first paid, the next $5,000 is paid to the claimant, and the remaining $5,000 subjected to the claims of the execution creditor.

A homestead where the husband or wife is insane may be sold or mortgaged under certain Statutory proceedings not necessary to recite here.

A Declaration of Homestead prevails over an attachment levied before the Declaration was filed where the judgment was not entered until after the Declaration was filed. Under the Statute all Mortgages or Trust Deeds executed by the husband and wife in proper form take precedence over the Declaration, but a vendor's lien takes precedence **only** if the rights of third parties do not intervene. A mortgage given by the husband alone to secure purchase money is defeated by a Declaration of Homestead recorded before the mortgage is recorded.

The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed and encumbered is executed and acknowledged by both husband and wife. Observe that I have stated it must be **acknowledged** by both husband and wife. The conveyance must be by one instrument and must be the personal act of the parties. It is not necessary that the instrument be signed at the same time by both husband and wife, or acknowledged at the same time, but both must join in the one instrument and both acknowledge.

A conveyance or a mortgage of the homestead cannot be executed by an Attorney in Fact. It must be the personal act of the party. The doctrine of **caveat emptor** applies to those dealing with a homestead. That is to say, the purchaser must beware, and the question as to whether the property is homestead or not

is a matter of fact, and I emphasize here again the necessity of having the title examined before purchasing or loaning money on any property. It might not occur to one loaning money upon a hotel or a flat building that the same might be homestead, and if he be dealing, we will say, with the husband and takes his mortgage without the wife joining, the wife has the full legal right to repudiate the transaction and avoid the mortgage. When it is found that the property is homestead, it is not necessary in taking a mortgage to require an abandonment of the homestead. Let both husband and wife join in the mortgage and the note and pay the proceeds to both. You are then as fully protected as if the homestead had been abandoned, and many times it works a hardship to the borrowers to require them to abandon their declared homestead.

It is not necessary that the second wife of a claimant join in any deed or mortgage. The homestead does not inure to the benefit of the wife other than the one who was the wife at the time of the Declaration, and if it is desired that she do have such benefit, a new Declaration must be filed.

Under foreclosure of any mortgage made by the husband alone before the homestead was declared, the wife must be made a party, or the decree will be void as to her. A homestead can be abandoned only by a Declaration of Abandonment or a grant thereof, executed and acknowledged by the husband and wife, if the claimant is married; and by the claimant if unmarried. Thus the removal from the premises does not work an abandonment of the homestead. It continues its homestead character so long as it be not legally abandoned in the manner prescribed. However, it has been held that where the husband deserted the wife and she made a deed alone of homestead property and the purchaser entered and occupied the premises for the prescribed time, he acquired title against the husband by adverse possession. The homestead may likewise be destroyed by divorce.

In case of divorce, if the homestead has been selected from community property, it may be assigned by the Court to the innocent party either absolutely, or for a limited period, subject in the latter case to the future disposition of the Court, or it may in the discretion of the Court be divided, or be sold, and the proceeds divided, and thereafter the property loses its homestead character. If a homestead has been selected from the separate property of either, then the Court upon divorce may assign it to the former owner of such property, subject to the power of the Court to assign it for a limited period to the innocent party. This limited period cannot extend beyond the life of the party. We

will take an instance of where the homestead was selected from the separate property of the husband. By the decree the Court will assign it to him as his property and may assign it to the wife, if she be the innocent party, for a limited period, and at the expiration of that period the property loses its homestead character. It has been held that if the wife in the case used as illustration fails to assert her right to have it assigned to her for a limited period that after the time for an appeal has passed she loses that right, and of course, when the right is lost the property has ceased to be a homestead.

If the selection is made by a married person from the community property, or from the separate property of the spouse making the selection, or joining therein, the land so selected on the death of either of the spouses vests in the survivor. In other cases, upon the death of the person whose property was selected as a homestead, it goes to the heirs or devisees, subject to the power of the Superior Court to assign the same for a limited period to the family of the decendent, but in no case is it, or the proceeds, rents, issues or profits thereof held liable for the debts of the owner except as above stated, and should the homestead be sold by the owner, the proceeds arising from such sale to the extent of the value allowed for a homestead exemption are exempted to the owner of the homestead for a period of six months next following such sale.

Upon the death of either spouse and an administration be had, then, upon the return of the inventory of the estate, or at any subsequent time during the administration, the Court may, on petition therefor, set apart for the use of the surviving husband or wife, or in case of his or her death, to the minor children of the decedent, all the property exempt from execution, including the homestead selected, designated and recorded, provided such homestead was selected from the common property or from the separate property of the persons selecting or joining in the selection of the same.

It must be remembered that under the circumstances above recited, that upon the death of one spouse, the property vests absolutely in the other without administration, but the Probate Court has jurisdiction to entertain a petition to have the same set aside. This is not an administration of the homestead property, but is merely an order taking the same out of the administration and finding that it is not subject to administration. This is a proper and safe course as the Court is thereby given jurisdiction to pass upon the homestead and judicially determine its validity. Section 1723 of the Code of Civil Procedure provides that if any per-

son has died who at the time of his death was one of the spouses owning land as a homestead, which lands by reason of the death of such person vested in the surviving spouse, any one interested in the property or in the title thereto, may file in the Superior Court his verified petition setting forth such facts, and thereupon and after notice by publication or otherwise as the Court may order, the Court may take evidence, and if upon such hearing it shall appear that such homestead vest in the survivor, the Court shall make a decree to that effect and thereupon a certified copy of such decree may be recorded in the office of the county recorder.

The whole effect of this procedure is merely to establish of record the fact of the death of the deceased spouse. It does not purport to give the Court jurisdiction to determine the validity of the homestead. As we have seen, the Homestead Declaration may be invalid for a number of reasons, and the fact of its validity would not be judicially established; therefore, the course first suggested, that is to say, a petition in the probate proceeding is preferable, as it is then determined for all time if the homestead be set aside, that the same was valid.

When a person dies, leaving a widow or minor children, the widow or children, until letters are granted and the inventory is returned, are entitled to remain in possession of the homestead. The status of the property at the time the Homestead Declaration is made determines the question of succession. The homestead is not subject to the payment of any debt or liability contracted by or existing against the husband and wife, or either of them previous to, or at the time of the death of such husband or wife, except as provided in the Civil Code. This clause "except as provided in the Civil Code," has been construed as not showing an intention to allow general creditors to reach the excess in value of over $5,000. The Court of Appeals has said this section must be construed in connection with other sections of the Code.

A homestead selected from community property, or from separate property of spouse making or joining in the selection, vests absolutely in the survivor, whether the value thereof be in excess of $5,000 or not, and is not liable for the debts of the estate of the deceased spouse, although such estate may be otherwise insolvent, and the fact that the excess in value of over $5,000 might have been reached during the lifetime of the deceased by appropriate proceedings, and that the creditors are thus placed in a worse position by the death, cannot change the Statute. The creditor is presumed to know the law and its provisions in relation to homestead, and with debts contracted with reference thereto,

and to the right of the survivor to take the homestead free from such debts. This does not apply of course to any debt secured by a Trust Deed or Mortgage in the lifetime of the deceased spouse.

When no homestead has been selected, designated and recorded, or in cases where the homestead was selected by the survivor out of the separate property of the decedent, the decedent not having joined therein, the Court upon administration must select, designate and set apart and cause to be recorded a homestead for the use of the surviving husband or wife, and the minor children, or if there be no surviving husband or wife, then for the use of the minor children out of the common property, or if there be no common property, then out of the real estate belonging to the decedent.

When property is thus set apart to the use of the family, such property, if the decedent left a surviving spouse, and no minor child, is the property of such spouse. If the decedent left also a minor child or children, one-half of such property belongs to the surviving spouse, and the remainder to the child, or in equal shares to the children, if there are more than one. If there is no surviving spouse the whole belongs to the minor child or children. If the property set apart is a homestead selected from the separate property of the decedent the Court can set it apart only for a limited period to be designated in the order and subject to such homestead right the property remains subject to administration.

Prior to 1873 the property under such circumstances vested only in the widow or minor children. The Code was amended in 1873 inserting the words "or surviving husband." If the homestead which was selected and recorded in the life time of the deceased be returned in the inventory of his estate appraised at more than $5,000, the Code directs that the appraisers must, before they make their return, ascertain and appraise the value of the homestead at the time the same was selected, and if such value exceed $5,000, the appraisers must determine whether the premises can be divided without material injury, and if they find that they can be thus divided, they must set apart to the parties entitled thereto such portion of the premises including the dwelling house, as will amount in value to the sum of $5,000, and make report thereof to the Court. If they find the premises cannot be divided without material injury, they must so report and thereafter the Court may make an order for the sale of the premises, and a disposition of the proceeds to the parties entitled thereto.

It is not essential in setting apart a probate homestead, that is to say, one set apart by the Court where none was declared in

the lifetime of the deceased, that there be a dwelling on the premises, and such a homestead cannot be set aside when one was declared in the lifetime of the deceased. The probate homestead cannot be carved out of any land which could not have been impressed with a homestead during the lifetime of the deceased, but the character of the property at the time of setting apart the homestead is not essential. Money cannot be set apart out of the estate in lieu thereof. When the homestead is set apart for the use of the widow and minor children or to the minor children, each minor is entitled to possession until reaching majority. Thus, if the widow convey her interest before the minor child attains majority, the minor is entitled to the possession as against her grantee.

It is mandatory upon the Court upon petition to set apart a probate homestead, and this is the right of which the widow cannot be deprived, and her deed to all her interest in the estate made after the death of her husband, does not convey her homestead right, and she can after her deed proceed to have the property set apart to her as a homestead, and this setting apart takes precedence over her deed.

This right to probate homestead cannot be affected by the will of a decedent. It has been held that any homestead right may be terminated by separation agreement. In case of the dissolution of the marriage by decree of divorce, the homestead, if it has been selected from the community property, may be assigned to the innocent party either absolutely or for a limited period, subject in the latter case to the future disposition of the Court, or it may in the discretion of the Court be divided or be sold and the proceeds divided. If the homestead has been selected from the separate property of either, it is assigned to the former owner of such property subject to the power of the Court to assign it for a limited period to the innocent party. It has been held that unless the innocent party assert this right before judgment, then after the judgment becomes final he or she is barred from asserting any homestead right. If there be no adjudication of homestead rights, the property continues to be the homestead of the spouses.

I will touch again upon the point that it is not the value, but the character of the property dealt with that governs when the homestead is set apart by the Probate Court, for it is a very important one as you shall see. As I have stated, when the inventory filed in the estate shows that the homestead selected before the death of the deceased exceeds in value the sum of $5,000, the appraisers must determine whether the premises can be di-

vided without material injury, and if they find they can be thus divided, they must set apart to the parties entitled thereto such portion of the premises including the dwelling house, as will amount in value to $5,000, and make report to the Court. If they find the premises cannot be divided without material injury they must so report and the Court will order a sale, pay to the owner $5,000, and the residue is the property of the estate, subject to the claims of creditors. But if these proceedings be not taken and the whole of the homestead be set apart and no appeal be taken within 60 days from the date of entry of the order, the judgment is final and thereafter the property is not liable for the claims of general creditors no matter what the value may be. It thus behooves one who is extending credit to ascertain the value of the homestead when his debtor dies and if it be in excess of $5,000 in value, to see to it that the steps are taken in the Probate Court to secure that excess for the creditors. We will take a case like this. Your customer owns a fine residence worth say $50,000. It is subject to homestead. You know of this, but you consider the excess available to you if you are obliged to sue. The owner dies and probate is had of his estate. During the course of the administration a petition is filed to set apart the property as a homestead. If this is not resisted by you the Court will order it so set apart, and the order is final in 60 days. Thereafter the property is no longer subject to the control of the Probate Court. The Court has lost jurisdiction of it. It is not a part of the estate at all and is not liable for debts of the estate. Your remedy is to see to it that the appraisers act as directed by the statute. You can always do this upon representation to the Court, who will compel the appraisers to act. This means that you must be vigilant when your debtor's estate is probated to see that the Court takes such action as regards the homestead which was declared before death, or, if the petition for setting apart of a probate homestead is filed, to see to it that property of excessive value is not set apart to the detriment of the general creditors. If you do not do this you cannot pursue the property, even though the estate be insolvent.

If your mortgage be upon property declared a homestead either before or after the execution of the mortgage and the mortgagor dies, you must present the claim in his estate or your right of foreclosure is lost. This is for the reason that other property of the estate must be exhausted in the payment of debts before recourse be had to the homestead property.

I urge these points upon you in closing. If you desire to file a homestead remember that the statutory requirements are abso-

lutely necessary to a valid homestead. Remember that residence is necessary. Remember that the homestead can only be abandoned by Declaration of Abandonment recorded, or by deed from husband and wife by the same deed and as their personal act. It cannot be done by attorney in fact. Removal from the property does not work an abandonment and if you move and do not abandon your first homestead by abandonment or deed, you cannot file a second declaration which will be valid. Remember that a husband cannot declare a homestead on his wife's separate property without her consent, but that the wife can declare upon her husband's separate property, her own separate property or the community property, without her husband's consent. Do not in cases where the property stands in the name of the wife, and she be deserted by her husband, allow her to file a homestead. She by thus doing gives her husband a right in the property which he did not have before, and his signature is required to any deed, mortgage or abandonment made thereafter. In loaning on homestead property do not require an abandonment, but see to it that your note and mortgage are executed by husband and wife and that you pay the proceeds to both. Always make investigation as to possession no matter what the character of the property may be. Do not take any mortgages or trust deeds without examinations of the title. Keep a watch on subsequent dealings with the property. If a homestead be declared after or before your mortgage, see to it, upon death of your mortgagor, that your claim is presented to the administrator. Remember that even if you require an abandonment of the homestead at the time you make your loan, a homestead subsequently declared, places you exactly in the same position as to necessity of presenting your claims. If it be homestead upon death of the owner you must file your claim or you cannot maintain foreclosure. Remember that if your title be registered under the Torrens Act as it at present exists, you cannot create a homestead after your title is registered.

VII.

Landlord and Tenant

Any property which is capable of being conveyed is capable of being leased, and a leasehold estate becomes personal property, no matter for what length of term it is written, although a long term lease, such as one from 50 to 99 years, approaches very nearly to the dignity of a fee title. Hence in leases for such terms great care is exercised in the preparation of the lease that every possible contingency may be foreseen and provided for. Usually such investments are made in such leases that the lessee is practically the owner of the property during the term of his lease, and it is usually provided that there are no liabilities or responsibilities on the part of the lessor, all of the burden of improvement, and cost of maintenance of the property being imposed upon the lessee, the landlord receiving but the agreed rent at stated periods. Thus many of the questions which continually arise touching the respective rights of landlord and tenant are practically done away with in these long term leases. It is then with the short term leases, either verbal or written with which this paper shall deal.

Leases of agricultural or horticultural land cannot be made in this State for a longer period than fifteen years, except for lands used for agricultural or horticultural purposes upon which is discharged waste water or sewage from any municipality. Such lands may be leased for a period not longer than twenty-five years. City lots may be leased for a period of not longer than ninety-nine years. Any real estate belonging to a municipality, minor, or incompetent person cannot be leased for a longer period than ten years, except lands used for agricultural or horticultural purposes, upon which is discharged waste water or sewage by any municipality. In such cases the land can be leased for a period not longer than twenty-five years.

A trustee of an express trust cannot lease the land beyond the period of his trust, unless it be otherwise provided in the trust agreement. A trustee of an express trust has power to lease the property for the benefit of annuitants, devisees, legatees or other beneficiaries, or for the purpose of satisfying any charge thereon.

Any person competent to make a deed is competent to execute

a lease, therefore it would be well to bear in mind that the rules upon which we have touched governing the powers of individuals or corporations to make deeds are applicable to the execution of leases. If the lease is for more than one year and is made by an agent of the owner, the agent's authority must be in writing or the lease is invalid, and cannot be enforced by the landlord against the lessee. Therefore, if you are taking a lease through an agent and the lease is executed by the agent in the name of the principal, it is incumbent upon you if the lease is for more than one year, to call for the written authority of the agent and determine therefrom what his powers may be. The lessor when he lets or leases the property is held to covenant that he is entitled so to do, and that so long as the lessee complies with the terms of his lease he shall have peaceable and undisturbed possession of the premises, so, if the title fails or it be shown that some one other than the lessee has the right of possession, the lessee is relieved from the obligations of his lease and may recover damages from the lessor if he has been misled to his injury.

This covenant for peaceable possession applies only to the acts done by the lessor, or those claiming under him. whereby he interferes with the right of possession of his lessee, but the lessor is not held to covenant against the acts or depredations of the title of a stranger. He must himself be responsible for the disturbance of the peaceful possession, otherwise he is not liable. Thus if a lessor lease to a tenant a store room and thereafter proceeds to make such alterations of the stories above the store room, or of adjoining rooms, that the occupation and possession of his lessee is disturbed, and the lessee suffers detriment and inconvenience in his business, the lessor can be held liable for the damage suffered by his lessee. The lessor is not held liable on this covenant for peaceable possession if the premises be destroyed by the act of God, or by any agency for which the lessor could not be held responsible. If the building is injured by excavations made by an adjoining owner and should tumble down, the lessor is not liable on this covenant if tenant have knowledge of the excavations and the risk thereof and elects to remain in the building. This of course in the absence of an express covenant between the lessor and the lessee as to any especial liabilities placed upon the lessor.

The lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, put it in a condition fit for such occupation and repair all subsequent dilapidations thereof except those caused by the want of ordinary care on the part of the lessee. After the lessor has placed the premises in such condition he cannot thereafter be held liable for

dilapidations caused by the tenant or for dilapidations of any additions or improvements made by the tenant himself. As we have said, the lessee is entitled to the peaceable possession of the premises free from any interference or disturbance by his landlord, for his estate, while he is entitled to the possession under his lease, extends to the entire domination over the property so far as occupancy and possession are concerned. The landlord has no more right to enter upon the premises than has a stranger, provided always, that the lessee has performed the covenants and conditions imposed upon him by the lease.

One who hires part of a room for a dwelling is entitled to the whole of the room, any agreement to the contrary notwithstanding. If a landlord lets a room as a dwelling for more than one family, the person to whom he first lets any part of it is entitled to the possession of the whole room for the term agreed upon, and every tenant in the building under the same landlord is relieved from all obligation to pay rent to him while such double letting of any room continues.

The lessee impliedly covenants to use the property only for lawful purposes and should he put it to an unlawful use, the lessor may cancel the lease and recover possession of his property. There is a penalty imposed upon a lessor if he leases or lets the premises for unlawful purposes, the first penalty being that he cannot recover rent or enforce the covenants under the lease, as such contracts are against public policy.

There was a Statute enacted April 7, 1913, popularly known as a "Redlight Abatement Act," wherein it is provided that the term "building" as used in the Act shall be deemed and held to mean and include so much of any building or structure of any kind as is, or may be entered, through the same outside entrance, and that every building or place used for the purpose of lewdness, assignation or prostitution is a nuisance which shall be enjoined, abated and prevented by the proceedings outlined in said Act, whether the same be a public or private nuisance. Whenever there is reason to believe that such nuisance is kept, maintained or exists, the District Attorney of the county must, or any citizen resident of the State within the county, may, in his own name maintain an action in equity to abate and prevent such nuisance, and to perpetually enjoin the person or persons conducting or maintaining the same, and the owner, lessee, or agent of the building or place in or upon which such nuisance exists, from directly or indirectly maintaining or permitting such nuisance. Upon the filing of a verified complaint, the Judge will allow a temporary writ of injunction to abate and prevent the continuance or recurrence of such nuisance. Any viola-

tion or disobedience of this injunction will be punished as contempt of Court by a fine of not less than $200 nor more than $1,000, or by imprisonment in the county jail for not less than one month or more than six months, or by both such fine and imprisonment. If the existence of the nuisance be established in the action, an order of abatement will be entered as a part of the judgment in the case, which order will direct the removal from the building or place of all fixtures, musical instruments and movable property used in conducting, maintaining, aiding or abetting the nuisance, and shall direct the sale thereof in a manner provided for the sale of chattels under execution, and will direct the effectual closing of the building or place against its use for any purpose, and so keep it closed for a period of one year. While such order remains in effect as to closing, the building will remain in the custody of the Court. The proceeds of the sale of the property removed is applied first to the costs of such removal and sale and the cost of closing and keeping closed the building, the payment of the costs in the action and the balance, if any, to the owner of the property so sold. If the proceeds of such sale do not fully discharge all such costs, fees and allowances, the building and place will be also sold under execution and the proceeds of the sale applied in like manner. If the owner of the building or place has not been guilty of any contempt of Court in the proceedings, and appears and pays all costs, fees and allowances which are a lien on the building or place, and files a bond in the full value of the property to be ascertained by the Court, with sureties to be approved by the Court or judge, conditioned that he will immediately abate any such nuisance and prevent the same from being established or kept thereat within a period of one year thereafter, the Court may, if satisfied of his good faith, order the premises to be delivered to the owner and the order of abatement cancelled.

If within a reasonable time after notice to the owner of dilapidations which he ought to repair, he neglects to do so, the lessee may repair the same himself, where the cost of such repairs does not require an expenditure greater than one month's rent of the premises, and deduct the expenses of such repairs from the rent, or the lessee may vacate the premises, in which case he shall be discharged from further payment of rent or performance of other conditions. But the tenant cannot so abandon the premises in need of repair and be relieved from his obligations under the lease unless he give notice to the landlord, and the landlord is not liable to the tenant for injuries caused by defects of which he has no knowledge, nor in cases where the tenant fails to give notice of defects in the building. It is otherwise where the premises are under the control

of the landlord, as in such case he is liable without notice from the tenant.

Where, after a fire the tenants continue to pay rent, they treat the premises as tenantable. Even though the law is that the hiring terminates by destruction of the thing hired and it is stipulated in the hiring that upon destruction of the building the lease shall terminate, the lessee is not entitled to recover the proportionate amount of rental which he has paid in advance. Though it be stipulated that in case of destruction the lessee shall be released from the payment of rent during the time the premises are untenantable this applies only to the rents which are payable after the destruction, and not to any rentals paid in advance unless, of course, there be specific contract to that effect. The liabilities and rights of the lessor and lessee upon destruction of the property by the elements is always governed by their contract. In the absence of the contract, then upon destruction by the elements the lease is terminated, and each relieved from any obligations thereunder.

A hiring of real property other than lodging and dwelling houses in places where there is no usage on the subject, is presumed to be for one year from its commencement unless otherwise expressed in the hiring. Thus, in some communities where lands are let, we will say, for the growing of vegetables, or for some specific purpose for a short time, and it is the custom of the community to rent for only six months, this Statutory presumption would not apply.

The hiring of lodging or dwelling houses for an indefinite term is presumed to have been made for such length of time as the parties adopt for the estimation of the rent. Thus a hiring at a monthly rate of rent is presumed to be for one month. In the absence of any agreement respecting the length of time or rent, the hiring is presumed to be monthly. If the lessee remains in possession after the expiration of the hiring, and the lessor accepts rent from him the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one month, when the rent is payable monthly, nor in any case exceeding one year. When there is no usage or contract to the contrary, rents are payable at the termination of the holding when it does not exceed one year. If the holding is by the day, week, month or year, rent is payable at the termination of the respective periods as it successively becomes due.

The lessee cannot pay his rent to any one other than his landlord without his consent, or in consequence of a judgment of a Court of competent jurisdiction. The right to receive the rents and the right to continue in possession run with the land and inure to the

benefit of and bind the successors and assigns of the respective parties.

Every tenant who receives notice of any proceedings to recover real property occupied by him, or the possession thereof, must immediately inform his landlord thereof, and must deliver to the landlord the notice if it be in writing, and he is responsible to the landlord for all damages which he may sustain by reason of the tenant's failure so to do.

In all leases of lands or houses or of any interest therein, from month to month, the landlord may, upon giving notice in writing at least thirty days before the expiration of the month, change the terms of the hiring to take effect at the expiration of the month, and this notice if served upon the tenant binds him to all the terms, rents, and conditions specified in the notice if he continues to hold the premises after the expiration of the month. This course is often resorted to to rid premises of an undesirable tenant, and is very effective if the tenant is financially responsible.

A written lease is binding on the lessee where he has accepted it and entered into possession, even though he has not signed the lease. Very often it is provided in leases that the tenant may not sub-let or assign the lease without the consent of the lessor. A tenant who violates this covenant forfeits his rights under the lease, provided that the landlord does not acquiesce. In other words, where this covenant for assignment or sub-letting is violated, the landlord cannot object if he afterward receive rent from the assignee or sub-tenant.

The assignment of a lease or sub-letting of any part of the premises does not, in the absence of a contract to the contrary, annul the lessee's obligation to pay rents, even if the landlord accepts rent from the assignee or the sub-lessee. The assignees or the sub-lessees are also bound for this rent, but they are relieved if they re-assign or surrender the sub-lease to the original lessee. The landlord can recover the rents against the original lessee even where there was an express covenant against sub-letting, and the lessor has accepted rent from the sub-lessee. The original lessee is surety for his sub-lessee unless the lessor release him. It is usual, particularly in long term leases, to make provision that upon assignment of the lease that the assignor shall after consent by the lessor, be relieved from all obligations under the lease and contract from and after the date of his assignment, and also to make provision that any assignee shall upon receipt of an assignment, agree in terms to pay the rent and perform the obligations of the lease. This is particularly good practice in long term leases, as by the very nature of the estate it rises almost to the dignity of a fee, and the lessee has

the practical ownership of the premises and where the successive assignees or successors in interest of the original lessee have assumed the payment of the rents, he should not in fairness and justice be held to the payment of the rents or other performances of the covenants of the lease after he has parted with his title.

Where the lessee abandons the premises and refuses to perform the terms of the hiring, the landlord has two remedies. He may sue for each installment of the rental as it becomes due, or he can take possession of the premises and re-let the same upon the best terms obtainable and recover the difference between the rents thus received and the amount promised to be paid by the lessee who has abandoned. He cannot under the terms of his lease sue for the entire amount of the rents therein expressed. He can only sue for the installments which accrue from time to time.

The lessor can only recover the actual damage suffered by him. Household goods and articles of wearing apparel and adornment cannot be seized or levied upon for rent. By special act, hotel, inn, boarding house and lodging house keepers have a lien upon the baggage and other property of value of their guests, or boarders, or lodgers brought into such hotel, inn, boarding, or lodging house by such guests, or boarders, or lodgers, for the proper charges due from such guests, or boarders, or lodgers, for their accommodation, board and lodging, room rent, and such extras as are furnished at their own request, with the right to the possession of such baggage or other property of value until all such charges are paid, and this lien extends to the property of a stranger, provided that the innkeeper has no knowledge of that fact, and it extends to the sample goods carried by a travelling salesman.

A chattel mortgage may be made on personal property including growing crops, grapes and fruit, and upon any and all kinds of personal property, except personal property not capable of manual delivery, articles of wearing apparel and personal adornment and the stock in trade of a merchant. It often occurs in leases of farming lands that the landlord shall have a certain percentage of the crops as rent, and the title to all the crops shall remain in the landlord until sold, or, there is agreement not to sell the tenant's share of the crop without the consent of the landlord. This covenant does not create a lien upon the share of the tenant as against any attacking creditor of the tenant, even after the crops have been harvested and sacked or stored. If the landlord desires to protect himself against general creditors of the tenant, he must take a chattel mortgage on the crop and file it in the recorder's office. Of course any sort of security may be taken for the performance of the covenants of any lease, or for the payment of any rent, but it must be borne

in mind as above stated, that the lessor can recover only actual damages upon abandonment by the lessee.

Now as to fixtures.

There is a distinction to be borne in mind here. The term "fixtures" in a strict sense applies to that which is affixed to and is a part of the land itself, while the term is used in another sense meaning such appliances and structures or articles placed upon the property which may be removed and which do not constitute a part of the land. Under this category fall trade fixtures. Real or immovable property consists of land, and that which is affixed to land. That which is incidental to or appurtenant to land and that which is immovable by law. Thus, a building placed upon land by a lessee with the privilege of removing it at the termination of the lease is real property until it be severed. A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines or shrubs or embedded in it as in the case of walls or permanently resting upon it as in the case of buildings, or permanently attached to what is thus permanent by the means of cement, nails, plaster, bolts or screws. A fixture has been defined as an article of personal property attached to the freehold. An annexation is necessary to constitute a fixture. Any personal property affixed to the land for the purpose of permanent improvement or for the use of the real estate makes the fixture appurtenant to the land and is not removable by the tenant. Whether a structure is a fixture depends on the nature and character of the act by which it is put in its place, and the purpose for which it is intended to be used. Thus, if the owner place permanent structures on the land, or other improvements which by their very nature show that they were intended for permanent use, and for the better use of the land permanently, they become immovable fixtures. On the other hand, if it be placed but temporarily on the land and not permanently affixed thereto, or to any structure, then on the land, it is a question of intent of the one placing it thereon as to whether or not it is an immovable fixture. The intention of the party making the annexation is the chief element to be considered in determining what are fixtures. If a tenant, no matter what his intention might be, should build permanent and substantial structures upon the land, or make additions or annexations to the structures already thereon, and in such manner as to give any one the impression that it was his intention they should be permanent, he cannot remove the same at the expiration of his term. The intention must clearly appear to make an article of personal property part of the land. As between the lessor and the lessee, whether a building or other improvement becomes a fixture, is a matter of agreement and the intention of

the party. It is a general rule that any fixture which by its nature does not become an integral part of the premises may be removed by the tenant during his term. If he fail to do so at the expiration of his term, it then becomes a part of the realty.

All fixtures annexed by the owner pass to a mortgagee whether they be fixtures for trade or manufacture, agriculture or habitation. The machinery in a factory held in place and steadied by screws to the floor and connected to the rest of the building with shafting or belting, but removable without injury to the building, is not appurtenant to the land. Buildings or cabins set upon blocks resting on the ground, not attached to the soil and removable without disturbing the land in any way, are not fixtures and are not appurtenant to the land. All appliances or additions which are made as I have stated, of a permanent character, and attached to, and made an integral part of the premises cannot be removed by the lessee; nevertheless all trade fixtures, all things brought upon the land for the purpose of conducting his business, and which may be removed from the property without disturbing the property, and which have not been permanently and substantially attached to the land, or the building thereon, may be removed by the tenant at the expiration of his lease. Thus, the building of a marble front to a building, the placing therein of plate glass, although the same be attached to the building by screws and the marble can be easily removed, is a permanent improvement and cannot be removed by the lessee. Awnings, swinging doors, screen doors and the like may be removed by the lessee if placed on the premises by him, if they be not intended as permanent improvements. Pipes placed in the building for conducting water therein belong to the land. A permanent furnace built in the house becomes a part of the land. A portable furnace, however, placed therein is not a part of the land. Tanks placed upon the property, if intended to be for permanent use upon the land, and which add value to the land itself for all purposes, belong to the land. Not so, however, if they are placed upon land by a tenant simply for use in the conduct of his own business, and in cases where they do not add to the intrinsic value of the land. All sluice boxes, flumes, hose pipes, railway tracks, cars, blacksmith shops, mills, all other tools or machinery used in working or developing a mine are deemed affixed to the mine.

When a person affixes his property to the land of another without an agreement permitting him to remove it, the thing affixed belongs to the owner of the land unless he chooses to require the former to remove it, but a tenant may remove from the demised premises any time during the continuance of his term anything affixed thereto for the purposes of trade, ornament or domestic use

if the removal can be effected without injury to the premises, unless the thing has by the manner in which it has been affixed become an integral part of the premises. It will be observed that this right exists only during the continuance of his term. If he forfeit his lease and the landlord re-enter on account of the forfeiture, he has not the right to remove any fixtures placed on the premises by him.

A mere trespasser upon land is not a tenant, and one is not required to give notice to vacate. If one enters the premises while he is negotiating with the owner for a lease, and pending the leasing he is a tenant at will of the landlord, and one who enters the premises with permission of the owner and without stipulation as to the time he is to occupy it, is a tenant at will. A tenant who holds over his lease without the consent of the owner is not a tenant at will. A tenancy or other estate at will, however created may be terminated by the landlord by giving a notice to the tenant to remove from the premises within a period of not less than thirty days, to be specified in the notice, and after the notice has been served, and the period specified by such notice has expired, but not before, the landlord may re-enter and proceed according to law to recover possession. Where the right of re-entry is given to a lessor in any lease, he may make such re-entry at any time before the termination of the lease by its terms, if the terms of the lease have been violated by the lessee, by giving him three days notice of his intention to re-enter, but after the right to re-enter has accrued by the terms of the lease, that is to say, at its expiration, he may re-enter or maintain an action for the possession without any notice whatever.

Every person is guilty of a forcible **entry** who either by breaking open doors, window or other parts of a house, or by any kind of violence or circumstances of terror enters upon or into any real property, or after entering peaceably upon real property turns out by force, threats or menacing conduct the party in possession. Every person is guilty of forcible **detainer** who either by force or by menace and threats of violence unlawfully holds and keeps the possession of any real property, whether the same was acquired peaceably or otherwise, or who in the night time or during the absence of the occupant of any lands unlawfully enters upon any real property and who after the demand made for the surrender thereof for the period of five days refuses to surrender the same to such former occupant.

The occupant of real property within the meaning of this Statute is one who within five days preceding such unlawful entry was in the peaceable and undisturbed possession of such lands. One cannot be guilty of forcible entry or forcible detainer if he enter upon the premises with the permission of the owner or any one in possession under the owner, but one may be guilty of

forcible detainer if he peaceably enter premises which are unoccupied and refuses to deliver possession thereof to the one entitled to possession after the five day notice to him to surrender possession. It is not essential to the forcible detainer that the premises be occupied when the one guilty of the detainer enters. He is held to disturb the possession of the one entitled to possession. One who has occupied under a lease or a letting, and his time has expired, is not guilty of forcible entry or forcible detainer, and the five days demand referred to need not be made.

A tenant of real property is guilty of unlawful detainer first, when he continues in possession in person, or by sub-tenant of the property or any part thereof, after the expiration of the term for which it is let to him, without the permission of his landlord or the successor in estate of his landlord, if any there be. Second: when he continues in possession in person, or by sub-tenant, without the permission of his landlord, or the successor in estate of his landlord, if any there be, after default in the payment of rent pursuant to the lease or agreement under which the property is held, and three days notice in writing requiring its payment, (stating the amount which is due) or possession of the property, shall have been served upon him, and if there is a sub-tenant in actual occupation of the premises, also upon such sub-tenant. Such notice may be served at any time within one year after the rent becomes due. In all cases of tenancy upon agricultural lands where the tenant has held over and retained possession for more than 60 days after the expiration of the term without any demand of possession or notice to quit by the landlord, or the successor in estate of his landlord, if any there be, he is deemed to be holding by permission of the landlord or his successor, if any there be, and is entitled to hold under the terms of the lease for another full year, and he is not guilty of an unlawful detainer during said year and such holding over for the period aforesaid is taken and construed as a consent on the part of a tenant to hold for another year. Third, when he continues in possession in person or by sub-tenant after a neglect or failure to perform other conditions or covenants of the lease or agreement under which the property is held, including any covenant not to assign or sub-let, and three days notice in writing requiring the performance of such conditions or covenants for the possession of the property shall have been served upon him, and if there is a sub-tenant in actual occupation of the premises, also upon such sub-tenant. Within three days after the service of the notice the tenant or any sub-tenant in actual occupation of the premises, or any mortgagee of the lease, or other person interested in its continuance may perform the conditions of covenants of the lease, or

pay the stipulated rent as the case may be, and thereby save the lease from forfeiture, provided that the conditions and covenants of the lease violated by the lessee cannot afterward be performed, then no notice need be given to said lessee or his sub-tenant demanding the performance of the violated conditions or covenants of the lease. Any tenant may take similar proceedings to obtain possession of the premises let to a sub-tenant in case of his unlawful detention of the premises under-let to him. Fourth: Any tenant or sub-tenant assigning or sub-letting or committing waste upon the demised premises contrary to the conditions or covenants of his lease, thereby terminates the lease, and the landlord or his successor in estate upon service of three days notice to quit upon the person or persons in possession is entitled to restitution of possession. The notices required to be served may be served either by delivering a copy to the tenant personally, or if he be absent from his place of residence and from his usual place of business by leaving a copy with some person of suitable age and discretion at either place and sending a copy through the mail addressed to the tenant at his place of residence, or if such place of residence and business cannot be ascertained, or a person of suitable age or discretion there cannot be found, then by affixing a copy in a conspicuous place on the property and also delivering a copy to a person there residing, if such person can be found, and also sending a copy through the mail addressed to the tenant at the place where the property is situated. Service upon a sub-tenant may be made in the same manner.

These points should be remembered. It is not necessary to give notice to the tenant where the term is fixed by the lease and the term has expired, but it is necessary to give him three days notice if the lease is terminated by breach of any covenant before the term stated in the lease.

Where one is a tenant at will of the landlord, thirty days notice to him is required.

Where one is a tenant from month to month, notice of thirty day to quit and three days notice, and demand for payment of rent is necessary.

Where one is guilty of forcible entry and detainer, five days notice is required.

The proof of the service of these notices must be made on the trial. They cannot be proven by affidavits. If the tenant refuses to vacate the property after the legal notice is given, the landlord has a right of action for forcible entry and detainer, or unlawful detainer as the case may be, the proceedings being outlined in the Code.

Suffice it to say here, that it is a summary action. The summons requires but three days service, and if the complaint establishes to the satisfaction of the Court, that fraud, force or violence in the entry or detainer occurs, and that the possession held is unlawful, the Court may make an order for the arrest of the defendant. On the trial of any proceeding for forcible entry or forcible detainer, the plaintiff is only required to show, in addition to the forcible entry or forcible detainer, that he was peaceably in the actual possession at the time of the forcible entry, or was entitled to possession at that time. If the alleged unlawful detainer be after default in the payment of rent, judgment against the defendant guilty of forcible entry or unlawful detainer may be entered in the discretion of the Court either for the amount of damages found by the Court or jury, or for three times the amount so found. When the proceeding is for an unlawful detainer after a default in the payment of rent under a lease which has not by its terms expired, the judgment is not enforced for five days after the entry of the judgment within which time the tenant or any sub-tenant or any mortgagee of the lease or any party interested in its continuance may pay into Court the amount of the judgment and the tenant will be restored to his estate.

It must be remembered that these actions for forcible entry and for forcible or unlawful detainer have no bearing upon the title to the land. They only go to the right of possession, hence the landlord himself may be guilty of forcible entry if he disturbs the possession of the one entitled to the possession. The object of this summary proceeding is to give quick remedy to one entitled to the possession of the premises who was unlawfully excluded therefrom, thus saving him long delays by actions of ejectment or to quiet title. They are devised and intended to prevent disturbances, personal encounters and violence. No one is entitled to enter and disturb the possession of another by threats and violence, no matter what his legal rights may be. If one is excluded from his land by an intruder, and if he at any time find the intruder off the land, he himself can enter and exclude the intruder without process of law.

VIII.

Contracts of Sale—Options—Escrows

It is essential to every contract relating to land that there should be:

1. Parties capable of contracting.
2. Their consent.
3. A lawful object and
4. A sufficient cause or consideration.

All persons are capable of contracting, except minors, persons of unsound mind and persons deprived of civil rights. The same rules apply to contracts in relation to the sale or purchase of lands as apply to deeds of minors and persons of unsound mind. The contract by a minor under the age of 18 years is void and requires no disaffirmance. If made when over the age of 18 years it may be disaffirmed by the minor when he reaches the age of 21 years or within a reasonable time thereafter if he survives, or if he die within the period, by his heirs or legal representatives.

A contract by one of unsound mind, but who has not been judicially declared to be so and committed, is not void, but voidable, and may be rescinded when he is restored to capacity. A contract made by a person of unsound mind who has been committed to an asylum, or who has a guardian, is void. Contracts may be enforced against a minor or a person of unsound mind for the necessities of life, when not under the care of a parent or guardian able to supply them, but this does not apply to contracts for sale and purchase of land. Husband and wife may enter into contracts with each other respecting their property as if they were unmarried. A contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it.

It is absolutely essential to a valid contract that there be a meeting of minds of the parties. There must be a consent which is free, mutual and communicated by each to the other. A consent which is not free is not absolutely void, but voidable, and gives the right of rescission to the aggrieved party. An apparent consent is not real or free when obtained through duress, menace,

fraud, undue influence or mistake. Consent is not mutual unless all the parties agree upon the same thing in the same sense. The words used are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning, or unless a special meaning is given to them by usage.

The scope of this paper will be confined to the subjects of contract, relating to the sale and purchase of lands, and escrows. As to the first of these topics, it is well to emphasize these points: to constitute a valid contract for sale and purchase there must be parties capable of contracting, there must be a meeting of minds and a mutual consent and agreement; there must be a lawful consideration and a lawful object; the contract must be equitable and must be in writing. There may exist circumstances under which a court of equity will enforce a verbal contract for the sale and purchase of real property; as when the parties have acted upon it and the one seeking to enforce has performed the obligations imposed upon him, or has partially performed and offers in good faith to fully perform. Or, where such contract is prevented from being put into writing by the fraud of a party thereto, any other party who is by such fraud led to believe that it is in writing and acts upon such belief to his prejudice may enforce it against the fraudulent party.

An agreement for leasing for a longer period than one year, or for the sale of real property, or of an interest therein must be in writing, subscribed by the party to be charged, or his agent, and such agreement, if made by the agent of the party sought to be charged, is invalid unless the authority of the agent is in writing subscribed by the party sought to be charged. Thus, a contract cannot be enforced against the vendee unless the instrument is subscribed by the vendee, or by an agent authorized by him in writing. Many instances occur where the seller gives to the buyer a receipt for a small part of the purchase price, balance of the purchase price to be paid at a certain time. This, if signed by the seller, or by his agent authorized in writing, might be held to be a sufficient writing to satisfy the statute so far as the buyer is concerned, and if he tender the balance of the purchase price he can compel a conveyance; but not so as concerns an action against the buyer to compel him to take the property if he has not subscribed the writing either himself or by his agent authorized in writing so to do. Such a receipt is a poor thing even for the buyer as usually it does not contain covenants as to warranty of title, and while the law imposes upon the seller the implied contract that he will execute and deliver a good and sufficient deed upon payment by the buyer, it does not necessarily follow that he must convey an unincumbered title.

In buying or selling land on contract see to it and insist upon it, that the contract be in writing, subscribed by all parties or by their agents. See to it if the contract be signed by an agent that he exhibit his written authority from the principal.

An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation, or a commission, must be in writing. It is important if you are taking such an agreement to specify fully therein your authority to sell the land, and to enter into contracts therefor in your principal's name. Remember that you cannot recover your compensation, or commission from the seller, even if he complete the transaction and receive the purchase price unless your contract with him be in writing. The essentials of such contracts will be more fully dealt with under the subject of Agency. Contracts between brokers or agents as to a division of compensation or commission, are not required to be in writing.

See to it that in buying or selling land that all the matters of agreement are contained in the written contract for, when the parties have reduced their agreements to writing, they cannot be varied by other agreements outside of the instrument. The terms of the written contract can only be varied by another written instrument executed by the parties to the original agreement, or their successors in interest. The execution of a contract in writing, whether the law requires it to be in writing or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument. Often a tract of land is subdivided and placed in the hands of agents for sale. It is common knowledge that this is constantly done in this community. The property is advertised and "boomed." Salesmen are employed by the owner or his agent to induce people to buy. These agents very naturally have no interest beyond the receiving of their commissions. In their zeal in this behalf they are frequently led into misrepresentation as to character of improvements to be made, or the effect of restrictions placed upon the use of property and the like. The writer has known instances where the salesman, without authority from the owner or his agent, has represented to buyers that streets are to be improved in certain ways, and water and gas mains laid, when these things were not contemplated by the owner. Again, I have known of representations made to a buyer that certain restrictions were to be imposed upon the whole tract which will be valid and binding. This, if the intending purchaser desires such restrictions. To one who objects to the restrictions the same

salesman has been known to declare that the restrictions if imposed will not be binding. Not in many instances does the buyer deal directly with the owner. Naturally he relies upon the representations made by the agent or salesman and is not careful to see that these promises and agreements are carried into the written contract. When they are not, troubles and disputes invariably follow; the buyer attempting to rescind because the promises have failed, and the seller insisting upon the terms of the contract as written for the reason that he never authorized such promises. If you are the buyer, see to it that all promises, agreements, and inducements are written in the contract. If you are the seller, insert words to the effect that you are not bound by any promises, inducements, representations, or agreements not set forth in the instrument which you execute.

Care should be taken in the preparation of such instruments that they may disclose in plain unmistakable terms the intent of the parties. The multiplying of words should be avoided. The simplest form is the best. When A and B who are competent to contract, for a lawful consideration, agree that A will sell on certain terms and B will buy on those terms, and the use to which B proposes to put the land be lawful, the contract is complete when they have signed a written instrument to that effect. A is then bound to convey when B pays the consideration. The law imposes on A the obligation to convey and B to pay, and accept the conveyance. Upon B's failure to pay, A is relieved from his obligation to convey. If A cannot deliver the title, B is relieved from his obligation to pay and may recover anything he may have paid with damages. These legal rights and remedies flow from the very act of the parties and it is not essential to the validity of the written contract that they be set forth. The multiplying of words then, seeking to define the respective rights and remedies of the parties, is superfluous and dangerous. Any special agreements or covenants must of course be set forth in the instrument but I point out that it is not necessary nor advisable to undertake to define the rights and remedies given to the parties under these covenants which the law itself gives.

These special agreements should appear in simple, direct language, the meaning of which cannot be questioned, and any matter of agreement having been once so stated it is not necessary nor advisable to repeat it in another form.

A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting so far as the same is ascertained or lawful, and in ascertaining the intent of the parties the language of the contract is to

govern its interpretation if the language is clear and explicit and does not involve an absurdity. A contract must receive such an interpretation as will make it lawful, operative, definite and capable of being carried into effect, if it can be done without violating the intention of the parties, and the whole of the contract is to be taken together so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other. We speak now of the intent of the parties to be ascertained from the language of the instrument itself. Courts may take evidence of facts and circumstances outside of the instrument to determine the circumstances under which it was made and the matter to which it relates and construe the contract accordingly, but without such judicial construction the individual called upon to construe the contract cannot do this except at his own risk. He must determine the intention of the parties as he finds it expressed in the contract. These rules apply when through fraud, mistake, or accident, a written agreement fails to express the real intention of the parties.

However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract and the particular clauses of a contract are subordinate to its general intent, therefore any repugnancy in a contract must be reconciled if possible by such an interpretation as will give some effect to the repugnant clauses, unless they denote an absurdity, subordinate however, to the general intent and purpose of the whole contract. In short the instrument must be considered as a whole—read from the four corners— and the general intent and purpose of the contract must prevail. Words which are wholly inconsistent with the nature of the contract, or with the main intent of the parties are to be rejected, but effect must be given to every word if possible in order to ascertain the true intent of the parties. In cases of uncertainty which cannot be removed by these rules, the language of the contract must be construed most strongly against the party who caused the uncertainty to exist. The one who makes the promise is presumed to be such a party; except in a contract between a public officer or body, as such, and a private party, in which case the presumption is that all uncertainty was caused by the private party. Where a contract is partly written and partly printed, or where part of it is written or printed under the special direction of the parties, and with a special view to their intention, and the remainder is copied from a form originally prepared without special reference to the particular parties, and the particular contract in question, the written parts control the printed parts, and

the parts which are purely original control those which are copied from a form. If the two are absolutely repugnant, the latter must be so far disregarded. If the contract is silent on the point, all stipulations and agreements which are necessary to make a contract reasonable are implied and imposed by the law. All things that are in law implied and considered incidental to a contract or as necessary to carry it into effect are implied by the very act of the parties in contracting unless they are expressly excluded in terms in the contract.

The distinction between an option to purchase land and an agreement for its sale and purchase is this. In the first instance the owner may obligate himself to sell his property upon certain terms, while there is no reciprocal obligation on the other party to purchase. It is a mere privilege which he acquires by the promises of the seller which he can exercise or not as he sees fit. When the seller has given an option to a buyer, he has extended to him a privilege only, and he cannot compel the holder of that privilege to buy, for there is no promise on the part of the buyer to complete the purchase. There being no promise on the part of the grantee of the option to complete the bargain, there must be a consideration paid for the privilege, otherwise it is of no value. A naked promise without a consideration is void in law. What consideration should be paid for an option is a matter to be governed wholly by circumstances. Courts will not inquire into the value a property owner sets upon the privilege he has granted. He is entitled to act in such matters on his own judgment. If I grant an option on my property worth $50,000 for a period of ninety days for $1.00 or $1,000, the Courts will not inquire into the reasonableness of the transaction. The property is mine. I am the best judge of its value to me. I am the best judge of the probabilities of the sale being made within that time, and if I am satisfied that $1.00 is a sufficient consideration to me to extend the privilege I am bound. But I conceive that under certain circumstances where the contract was induced by fraud or misrepresentation or was against good conscience the courts would be prompt to relieve me if the consideration moving to me was trifling and not commensurate with the importance of the transaction. In all cases an option to be enforceable must be supported by some consideration. For the very reason that I, the grantor of the option cannot enforce its exercise by my grantee, to make the option enforceable against me I must have received some consideration for my promise. It is otherwise in a contract for sale and purchase for here the promises are reciprocal. One agrees to sell and one agrees to buy. These recip-

rocal obligations constitute a consideration even though no money passes at the date of the contract and the contract is enforceable against either party.

If the time for the exercise of the option has been definitely fixed by the contract it must be exercised within that time or the seller is relieved from all obligations to perform, unless the fault be with him. There being no reciprocal obligations, equity does not extend to him who has the option any indulgence in the matter of time, unless the grantor of the option has placed it beyond the power of the grantee to perform within the time limit. It follows then that to secure the benefit of the option and to bind the grantor the grantee thereof must strictly perform. He cannot complain if the grantor refuse to perform, if he himself be in default. There are certain distinctions here between an option to purchase and a contract to purchase which will be pointed out later. Suffice it to say here, that a grantee under an option, obtains by his contract no interest in the land until he exercise the option and comply with the terms of his offer, while under an agreement for sale or purchase, the purchaser acquires at once the full equitable title to the land, leaving but the bare legal title in the seller, and when he has paid the full purchase price the seller holds this legal title in trust for the buyer. He acquires this equitable title at once, whether he has made any payments or not upon the execution of the contract and as we shall presently see his rights are higher than those of one who has merely purchased a privilege to buy. Under options then time is strictly of the essence of the contract and in the absence of any act on the part of the seller which prevents its exercise, the grantee of the option must exercise this privilege within the time limit or lose the right. He is granted no indulgences. His right to purchase is measured strictly by the terms of the grant and equity will not enlarge it, if the grantor be not at fault.

It is usual to insert in a contract of sale and purchase that time is of the essence of the contract. This means that the payments must be made when due or the contract may be forfeited. This provision is for the benefit of the seller and may be waived by him. Where time is not made expressly of the essence of the agreement the buyer has a reasonable time after the due date of purchase price to make payment. Where the seller has in any instance accepted payment of any installment after its due date he is deemed to have waived the privilege given him by the stipulation that time is of the essence of the agreement, and, if he again desires this privilege, he must notify the purchaser that thereafter the payments must be made when due, and that he will not accept any payments after their due date. This frequently happens. A sells to B upon

monthly installments payable on the first day of each month. Time is declared to be of the essence of the agreement. B makes payments and A accepts them at any time. Sometimes B pays during the month; perhaps he runs along two or three months without making any payments. Then A accepts all arrears. Presently B ceases making payments for a considerable period. A cannot declare his contract forfeited until he has given B notice to pay all arrearages, and that thereafter all payments must be made strictly on the due date. If upon notice B pay up, and he has this right, the right of forfeiture in A is gone until B be again in default, and after notice to him that no more indulgence will be granted. Care should be taken by the seller to give the buyer an opportunity to pay up arrearages before forfeiture is declared, otherwise the buyer may within a reasonable time after such declaration make, tender and compel a conveyance to him, and this against any grantee who may have purchased from the seller with notice of the contract.

Where time is expressly made of the essence of the contract, the seller upon forfeiture is entitled to retain all monies theretofore paid to him on account of the purchase price.

Every contract by which the amount of damage to be paid, or other compensation to be made for the breach of an obligation is determined in anticipation thereof, is to that extent void, except that the parties may agree in the contract upon an amount of damage sustained by a breach thereof when from the nature of the case it would be impracticable or extremely difficult to fix the actual damage. It is not often attempted to stipulate in the ordinary contract of bargain and sale for so called "liquidated damages;" that is to say for a certain fixed sum which shall be forfeited to the seller if the buyer fails to perform. Ordinarily the only penalty imposed is the forfeiture of all monies theretofore paid to the seller. There are instances where such an agreement as to liquidated damages would be enforced. We will take a case where the contract is entered into without any payments being made to the seller. The buyer agrees to put the land to certain uses and the enterprise is uncertain and hazardous. It is perfectly legal to agree upon a sum which shall be the amount of damage suffered by the seller in case the enterprise fails and the buyer fails to perform, which shall be forfeited to the seller, but where the actual damage is certain of ascertainment the law will not enforce the forfeiture of a stipulated sum. The one damaged can recover only the actual damage suffered. It is a common practice for parties to agree upon a sale and purchase and place the preliminary papers with a third person pending the consummation of the deal. Frequently we find such cases as

this. A agrees to enter into a contract of sale and purchase with B at a certain time provided B put up, we will say $5,000.00 to bind the bargain. This is done with the agreement that unless B carry out the bargain he shall forfeit this sum. Such an agreement cannot be enforced. A can recover only his actual damage despite the agreement for forfeiture. Whenever by the terms of an obligation, a party thereto incurs a forfeiture by reason of his failure to comply with its provisions, he may be relieved therefrom upon making full compensation to the other party except in a case of a grossly negligent, wilful, or fraudulent breach of duty, and on the breach of a contract the measure of damages is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby or which in the ordinary course of things would be likely to result therefrom. Thus where the seller is unable to convey the land he has agreed to convey, even if he has agreed to pay a certain sum as liquidated damages, he is held to be liable only in actual damages.

The agreement for the payment of liquidated damages gives way to the following rule: The damage suffered by the buyer in such a case is deemed to be the price paid and the expenses properly incurred in examining the title and preparing the necessary papers with interest thereon; but adding thereto in cases of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed at the time of the breach of contract and all expenses properly incurred in preparing to enter upon the land. The damage caused by a breach on the part of the buyer is deemed to be the excess, if any, of the amount which the buyer has agreed to pay under his contract, over the value of the property to the seller. This value to the seller of course must be established by evidence. It does not rest in his judgment. Thus if B agree to buy the property for $10,000 and fail to carry out the contract, and at the time of his breach of this contract the value of the property to the seller is but $8,000, A has his right of action against B for $2,000. These remedies must not be confused with the other remedies of the respective parties to a contract. Damages upon breach can only be recovered when the party claiming them is not himself in fault, and the other party has placed himself in a position preventing performance by him or refuses to carry out his contract. Thus if I agree to sell certain property to you and afterward I convey the property to one who has no notice of my contract with you, for a valuable consideration, you cannot compel specific performance of the contract; that is to say, you cannot compel a conveyance of the land to you, but you can recover damages from me to the amount which you have paid me on account of the purchase

price and any expenditures you may have legitimately made in and about the transaction with interest. If you as buyer commit the breach, I, as seller, have several rights and remedies, as I shall show later.

It is encumbent upon the buyer that he be ready and willing and able to make his payments before he can place the seller in default. Thus if the seller still own the land when the buyer is ready to pay, the buyer must make tender of the money due before he has a right of action against the seller. He must make the tender in good faith and keep it good. This he is not required to do if the seller has placed himself in such a position that he cannot convey. The law requires no idle act. The grantee of an option to purchase is required to make a tender of the purchase price before he can enforce a performance, for until he has paid or offered to pay, there is no mutuality of agreement. The seller under a contract of sale and purchase must in certain instances tender a deed to the buyer before he can maintain an action to forfeit or foreclose the interest of the buyer or compel the buyer to perform. Thus where the contract provides that upon default in payment of any installment of the purchase price the whole amount of the purchase price shall become due and payable at the option of the seller, the buyer is entitled to notice of the exercise of this option and the seller must before the buyer is put in default notify him of this election and tender him a deed and demand payment of the whole sum. In cases where the last installment of the purchase price is due and unpaid the seller must tender a deed before he can maintain his action. In cases where time is not expressly made of the essence of the contract, and default is made in any payment, the seller must demand payment and give a reasonable length of time to the buyer to pay before he can forfeit the contract or take any action thereon. He is not obliged to tender a deed unless, as I have said, the contract gives him the option to declare all payments due and he exercises that option. The buyer, if payment is not demanded of him and he be given a reasonable time to make payment, may after forfeiture is declared, or suit begun to foreclose, make tender within a reasonable time after the installment is due and be reinstated. What is a reasonable time will always be determined by the Courts from the particular circumstances of the case.

Where the contract recites that time is of the essence thereof this implies that the payments are to be made on the due date and not later. If they are not so made and the seller has granted no indulgences he need not make a tender of deed before declaring forfeiture, or beginning his action for foreclosure or specific performance or damages, nor need he give any notice, unless the con-

Vendor & Vendee.
WAIVER OF FORFEITURE--Revivor of Right.

de Bairos v. Barlin, __ Cal.___, 59 Cal.Ded.570; 1920--
on Petn. for Hearing after Judgment __ Cal.App.___,
31 C.A.D. 353.

"Acceptance of overdue ~~xxxxxxx~~ instalments of the price, on an executory contract for the sale of land, waives any right to declare a forfeiture on account of the previous failures to pay when due. BUT SUCH ACCEPTANCE DOES NOT CHANGE THE TERMS of the contract as to forfeiture for FUTURE FAILURES, nor eliminate the provision that time is of the essence of the contract.

"There may be conduct and acquiescence by the vendor sufficient to justify the inference by a court as a matter of fact that the vendor has waived the conditions of a contract regarding a forfeiture, which he afterward claims the right to enforce, and when in such a case the waiver has continued until after all instalments are due, the condition cannot be revived except by notice to the vendee. (Boone v Templeton, 158 Cal 206; Stevenson v. Joy, 164 Cal. 285; Hoyt v Bentel, 164 Cal. 624; American Etc Co. v. Butler, 165 Cal. 519; Myers v Williams, 173 Cal. 304.) BUT NONE OF THESE CASES HOLDS THAT SUCH WAIVER IS ABSOLUTE, OR THAT THE PROVISION CANNOT BE REVIVED AND A FORFEITURE PRODUCED BY A NOTICE REQUIRING PERFORMANCE WITHIN REASONABLE TIME."

tract by its terms requires notice. The tender must be made by either party or by some person on his behalf and with his assent. In the absence of any agreement to the contrary the tender may be made at any place where the person sought to be bound thereby may be found, and if he cannot with reasonable diligence be found within the State and within a reasonable distance from his residence or place of business, or if he evades the party seeking to make the tender, then at his residence or place of business. The tender must be made in good faith and must be free of conditions which the one sought to be bound is not bound to perform. The tender is of no effect if the one making it is not able and willing to perform. It is not necessary to produce the deed or money unless the tender be accepted. If the one to whom tender is made makes no objections, if he be given the opportunity and these objections could be obviated by the one making the tender, and he fail to advance them, he is deemed to have waived such objections.

The seller cannot sue for the purchase price independently of his action to foreclose or for specific performance, and then he cannot recover unless he can comply with the contract and deliver the land. The seller cannot forfeit the contract, retain what money he has received and recover the balance of the purchase price.

Oftentimes notes are given for installments of the purchase price in addition to the obligation to pay contained in the contract. This is an unsafe practice for the buyer unless the notes recite on their face that they are given for such purpose. Reference should be made in the note to the contract, for if this be not made to appear, and the note be negotiable in form, the seller may sell them to another and if the purchaser take before maturity without notice of the contract, the buyer is bound, whether the seller complies with the contract or not. Do not sign any notes for the purchase price unless it appear that they are to evidence the payments to be made under your contract.

We now come to consider the precautions to be exercised by the buyer, when he purchases under a contract. First, he must know that the one from whom he purchases has capacity to contract and is the owner of the property, and the condition of the title as to encumbrances. Many, many people have suffered loss by failure to do this. If upon the title being exhibited the buyer finds it encumbered by a mortgage, to save himself in law he must see to it by stipulation with the seller that he may apply his payments toward the mortgage. The mortgagee is not bound to take any notice of the contract, and the buyer must depend upon the integrity of the seller unless he protect himself by agreement that he himself may pay the mortgage and receive corresponding credits

on the purchase price. If the buyer does not go into possession of the property he should record his contract, that every one subsequently dealing with the land may have notice of his rights. If in possession, he need not record it, as possession is the highest form of notice. When the buyer has thus given notice, any mortgagee loaning money to the seller thereafter takes subject to the rights of the contract holder, and unless he deal with him, runs the risk of losing his money. When the contract holder seeks to enforce specific performance he can show payment to the seller and the mortgagee who has taken subject to his rights cannot enforce his lien against him.

If the property be the homestead of the seller, and the seller be married, the contract must be executed by both spouses personally. The execution by an agent or attorney in fact is not binding. If, after the contract be entered into a homestead be filed, it does not defeat the contract. The homestead right is deemed to be subject to the buyer's rights. It often occurs that after a man enters into a contract to convey the community property or his separate property, that his wife, at the instance of her husband, who desires to repudiate his bargain, or upon her own volition, seeking to prevent a conveyance, files a declaration of homestead. This does not prejudice the rights of the buyer, as upon performance on his part he may compel conveyance by both spouses, and should they refuse the Court will appoint a commissioner to convey for them.

Now, as to the rights and remedies of the parties upon breach of the contract. It is important to observe that no Court will enforce a specific performance of a contract which is not fair and equitable and which is not supported by an adequate consideration, nor will any Court grant relief to one who does not come into Court with clean hands. Here again stands out the maxim, "He who seeks equity must do equity." I have touched before upon the danger of inserting stipulations in the contract which are drastic in their operation and oppressive upon the buyer. It must be remembered that the buyer, when he has made any payment, is the owner of the full equitable title; he is entitled to the possession, and the seller is the owner of the purchase price, and when it is all paid to him or tendered to him, equity adjudges the buyer to be the owner of the land and the seller the owner of the bare legal title in trust for the buyer. It is true that many times irresponsible and dishonest persons will enter into contracts to purchase without the ability or intent to carry out their contract and cause annoyance and expense to the seller to oust them from the premises, but there is a duty resting upon the seller to ascertain with whom he is dealing and govern himself accordingly.

The cautions I have given are of interest to the seller when he comes to forfeit the contract, or when he seek to foreclose it, or compel performance. A court of law will scan the contract very closely before it declares a forfeiture to see that no undue advantage is being taken. Courts are hostile to forfeitures. Courts of equity which never declare forfeitures will, when the action is brought to foreclose the contract or compel specific performance, look to the consciences of the parties and not to the letter of the law, and if it be found that the stipulations are unjust, unfair, oppressive and against good conscience, will refuse to give them effect. A plaintiff who exhibits a contract wherein the stipulations are substantially all in his favor finds a hostile Court.

These are the rights of a buyer under a contract of sale and purchase. To rescind or sue for damages as above stated, or to compel specific performance. These are the rights of the seller: To rescind, to sue for damages as above stated, declare a forfeiture, to foreclose in an equitable action, or to compel specific performance. Recission, which means the abrogation of the contract and the placing of the parties in the same position as before the execution of the contract, may be accomplished as follows: By one over the age of eighteen years upon his attaining majority, or within a reasonable time thereafter, or in case of his death within the period by his heirs or personal representatives, upon restoration of the purchase price if the minor be the seller, or, surrender of the land, if he be the buyer. Bear in mind all the time that a minor under the age of 18 years can make no binding contract and need make no restoration if he or she desires to repudiate the bargain. He or she is not required even to signify such a desire. Such a contract is void and one who deals with a woman before she arrive at the full age of 18 years or a boy under the age of 18 years runs the risk of losing both the land and his money. If he deal with a boy between the age of 18 and 21 he runs the risk of the rescission of his contract when the minor becomes of full age, or within a reasonable time thereafter, or if he die within the period, by his heirs or legal representatives. Such a contract made by one of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined, may be rescinded by him upon his restoration to capacity.

Any party to a contract, who is competent to contract is entitled to rescind in the following cases only:

1. If the consent of the party rescinding or of any party jointly contracting with him was given by mistake, or obtained through duress, menace, fraud, or undue influence exercised by or with the connivance of the party as to whom he rescinds or of any other party to the contract jointly interested with such party.

2. If through the fault of the party as to whom he rescinds the consideration for his obligation fails in whole or in part:

3. If such consideration becomes entirely void from any cause:

4. If such consideration, before it is rendered to him fails in a material respect from any cause; or

5. By consent of all other parties.

Any stipulation in the contract that the same shall not be rescinded but shall be compensated in damages does not take away this right of rescission for fraud, nor for mistake, when such mistake is in a matter essential to the inducement of the contract and is not capable of exact and entire compensation. Rescission when not effected by consent of the parties can be accomplished only by the use, on the part of the party rescinding of reasonable diligence to comply with the following rules:

1. He must rescind promptly upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence, or disability and is aware of his right to rescind; and

2. He must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same upon condition that such party shall do likewise unless the latter is unable or positively refuses to do so. The contract may be rescinded when it is unlawful for causes not apparent on its face and the parties are not equally in fault or when the public interest will be prejudiced by permitting it to stand. Rescission cannot be adjudged for mere mistake, unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made, and on adjudging the rescission of a contract the Court may require the party to make any compensation to the other which justice may require.

When the buyer has made his payments he may compel a conveyance from the seller, or his assignee with notice upon refusal to make the deed in an action for specific performance. The Court, if the buyer be not in default, and if the contract be fair and equitable and the consideration adequate, will direct the seller to convey, or upon his failure to do so, will appoint a commissioner to make deed for him.

If the buyer be in default the seller has several rights and remedies in addition to his right to sue for damages as above stated.

If time be made the essence of the contract, and default has been made in any payment when due, and no indulgence or waivers have been granted by the seller, and there be no agreements to the contrary, he may stand upon the letter of his contract and declare a forfeiture, without notice or judicial proceeding of any kind. Under such circumstances he is entitled to retain all money there-

tofore paid to him on account of the purchase price. It is not necessary to give notice to the buyer that his rights have been forfeited, for the buyer is deemed to know the exact terms of the contract as they stood when made, and if there have been no changes therein, no waivers or indulgences he cannot claim that he is entitled to notice of his own default. This is not true, however, where the seller has accepted payments after the due dates and thus waived the strict performance of the contract. When he has once done this he must, before he can declare a forfeiture or bring any action, notify the buyer that he must pay up all arrearages and thereafter make payments strictly on the due date. If the buyer pays up, his rights are saved, and he must thereafter strictly comply with the original terms of the contract if he avoid forfeiture. If the seller does not again indulge the buyer and refuses any further payments after the due date, he again has the right of forfeiture, as originally given him. This is a swift and drastic remedy and is most often employed where the buyer is not in possession, or has not recorded his contract. Great care must be exercised in such a case that the buyer's rights are not infringed and that he be given full and fair notice. No particular form of notice is required. Any notice which a person of ordinary understanding can comprehend is sufficient. Courts are hostile to forfeitures, as I have said, and will hold the one seeking the remedy to the highest account.

In cases when the contract has been recorded and it is desired to clear the record of the apparent cloud, an action for forfeiture may be brought and upon proof of such facts as would warrant a forfeiture without action, the Court will declare the contract forfeited and the record is cleared.

An action for an equitable foreclosure may be maintained in cases where the seller has not grounds for forfeiture, or if he waive forfeiture, and it be desired to clear the record and recover possession. The Court, will upon a proper showing, decree that the buyer pay up all arrearages within a certain time determined by the circumstances of the case, or stand foreclosed. The buyer may then pay up all installments in arrears and be reinstated. He would be compelled to pay up the whole purchase price if the contract provided that upon default in payment of any installment the whole purchase price should become due and that option had been exercised by the seller. No notice of the exercise of this option need be given other than the filing of the complaint. If the buyer do not pay up, then a further decree should be obtained setting forth this fact and that plaintiff is entitled to the possession, and if the buyer continues in possession, a writ of possession should be obtained whereby he will be dispossessed by the sheriff.

An ordinary action to quiet title may be maintained by the seller, if it be desired to clear the record or obtain possession. Upon entry of such a decree the plaintiff may secure the writ of possession.

Lastly the seller may stand upon his contract, and compel the purchaser to complete his bargain, take the land and secure judgment for the purchase price. But this he cannot do unless he tender a deed and title in all respects as agreed in the contract to be delivered by him, and no personal judgment can be taken against any assignee.

No stipulations in the contract that upon assignment of the same, or recordation of the same, that it shall be forfeited are of any effect, nor is an agreement that a declaration of forfeiture filed in the office of the County Recorder be conclusive evidence of such forfeiture of any avail to the seller, unless there be an actual forfeiture in law and one which a Court would impose. Such clauses in a contract but work detriment to the seller, for the Courts lean toward the buyer when forfeiture is sought, and will search the contract for evidence of oppression or hardship upon him.

Do not record your contract unless you mean in good faith to comply with it. Do not record it merely for the purpose of clouding the title, for there is such a thing as slander of title, and the seller may hold you in damage if he suffer loss by your act.

Much confusion exists as to the distinction between escrows and executory agreements. Agreements are executed when all is done which is contemplated by the parties. An executory contract is one which is yet to be performed and something is yet to be determined upon between the parties. At law a contract under certain circumstances, is deemed to be executed when there is nothing further to be done requiring further consent of the parties or further meeting of minds, but yet there remains something to be done to render effective the agreement as it stands.

Under this head fall escrows and I shall distinguish between a pure escrow at law which is an executed contract, and so-called escrows where the agreement is executory.

Section 1057 C. C. defines an escrow as follows:

"A grant may be deposited by the grantor with a third person, to be delivered on the performance of a condition and on delivery by the depositary will take effect. While in the possession of the third person and subject to condition it is called an escrow."

The first point to observe is that the agreement is complete. The condition referred to is one upon which the parties have agreed. The delivery to the depositary must be absolute and complete with intent to surrender dominion over the deed and with full intent

that it be effective when the condition is performed. It is delivered for the benefit of the grantee. Any instructions to the escrow holder, except to deliver when the condition is performed voids the escrow. Where a valid delivery has been made in escrow a delivery back to the grantor by the escrow holder does not cancel the deed. A deed cannot be delivered in escrow to the grantee, his agent, or attorney. It must be delivered to a third person. Here is a legal escrow:

A delivers his deed to B to be delivered to C upon payment by C of a certain sum in a certain time. There is nothing left to be determined. The contract of sale and purchase is executed, save the exchange of the deed for the money and when C pays and B delivers the deed to him the law considers the second delivery to relate back to the first delivery as if it had been simultaneous with the first. The reason for this is obvious. The transaction being complete, nothing remaining to be done by the way of agreement, the second delivery is considered the first to cut off the rights of intervening parties. If A die while the deed is in escrow yet B may make payment and the property is his from the date of the first delivery.

It is equally obvious that this could not be so if there yet remained anything to be settled on upon between the parties, for in such case the first delivery could not be considered absolute. So, if any conditions are imposed other than that which has been settled upon at the time of the first delivery, as, should the grantor say deliver this deed to B, if he pay you a certain sum on or before such a day provided I acquire title before that day satisfactory to him, or "I reserve the right to recall this deed," or "Provided B and I do not otherwise agree," or the like, there is no escrow. B is simply a depositary of the deed and when C finally takes over the deed the second delivery does not relate back to cut off intervening rights of third parties. If C pay the money to B with instructions to pay it to A if the title be found in a specified condition, the same result is brought about. To create a true escrow then, the grantor must deposit his deed with a third person with full intent to surrender dominion over it and to pass title to his grantee under conditions certain at the date of delivery by him to the escrow holder and which leave nothing to be determined by the parties. Where the deed is not placed in escrow but is placed in the hands of one with authority to deliver when certain things are to be assented to by grantor such as the terms of a mortgage to be taken and the like, or when the grantee deposit his money conditioned that it be paid out on his order, or when the title can be shown to be in a certain condition, there is no escrow as the law knows it, but the depositary

is the agent of the parties. This is the common business custom in this vicinity and a commendable one. The transaction is rarely such that every detail of a sale and purchase are determined upon before the deposit of papers and money. While such agency agreements popularly called "escrows" have not the legal elements of an escrow, they are of great convenience and serve the purpose in nearly very particular as a pure escrow. I shall touch upon them more at length in our discussion of Agency.

Analagous to an escrow is a transaction where a grantor delivers a deed to a third person to be delivered to the grantee after death of the grantor. In such a case there must be no conditions, but the intent must appear to pass the title at once, the enjoyment thereof to be postponed. When this appears, the effect is to pass the title from the grantor at the date of the first delivery, leaving in him a life estate only. When such deeds are delivered, thereafter if the land be sold or incumbered the deed or mortgage should be executed by both grantor and grantee under the first deed. Such deeds are often made and deposited with intent to avoid probate proceedings. This is perfectly lawful. In many cases several parcels are included in the deed. Some of these it is desirable to sell before the death of the grantor. Then both grantor and grantee under the deed should join in any conveyance that when the original deed is recorded after the death of the grantor no question will arise as to priority of conveyance and delivery.

IX.

Mechanics' Liens

A new Mechanics' Lien law went into effect June 30, 1911, and it is of this Act that I shall speak. As many changes were made in the then existing law, most of the decisions and rules laid down by the Court in the interpretation of the law as it formerly existed are not pertinent now.

I will say that the chief distinction between the new law and the old law is, that under the present law the property is liable for the full amount of the reasonable value of the lien, and is not in any way limited by the amount of any contract price agreed upon between the owner and the contractor. This was not true under the old law, where in all cases the lien holders were confined in their recoveries to the agreed contract price. That this led to collusion and fraud it can be readily seen, for if the owner and contractor were dishonest they could agree upon a price less than the actual value of the labor and materials furnished. Under the new law an owner may protect himself against any liens beyond the agreed contract price by filing a copy of the building contract in the Recorder's Office, and requiring the contractor to furnish a bond with two sufficient sureties, which shall inure to the benefit of all lien claimants, and any lien claimant may look to this bond for any sums due him over and above the contract price. In short, a material man or laborer is not concerned with the contract price. If he is not paid out of the agreed sum he must be paid by the bondsmen, or his sureties. Again, under the new law, it is not necessary to retain any part of the money or to fix periods at which it shall be paid. The full amount of the agreed price could be paid at once upon the signing of the contract without interfering with the rights of lien claimants.

Under the present law there is no distinction or priority of liens, except that the contractor is the last to be paid. There is no change in the law concerning the rights of mortgage or trust deed holders. If the mortgage or trust deed is recorded before any contract is made, and before any work is done on the premises, or any material furnished thereto, it takes precedence over all subsequent claimants, as the claimants must be deemed

to have dealt with the property with notice of the mortgage or trust deed. However, if any labor be done on the premises or any material furnished thereto, a trust deed or mortgage subsequent to this is subjected to all possible claims arising thereafter. Great caution should be exercised therefore in making loans for building purposes, to see that no labor has been done on the ground, and no material placed thereon at the time the mortgage or trust deed is recorded, else the mortgage or trust deed will be subject to all liens for labor or material.

I will set out in full the main portions of the Act as they are practically self-explanatory.

Mechanics, material men, contractors, sub-contractors, artisans, architects, machinists, builders, miners, teamsters and draymen, and all persons and laborers of every class performing labor upon, or bestowing skill or other necessary services, or furnishing materials to be used or consumed in, or furnishing appliances, teams and power contributing to the construction, alteration, addition to or repair, either in whole or in part, of any building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad, wagon road or other structure, shall have a lien upon the property upon which they have bestowed labor or furnished materials, for the value of such labor done and materials furnished and for the value of the use of such appliances, teams or power, whether at the instance of the owner, or of any other person acting by his authority or under him, as contractor or otherwise.

And every contractor, sub-contractor, architect, builder or other person having charge of the construction, alteration, addition to or repair, either in whole or in part, of any building or other improvement as aforesaid, shall be held to be the **agent of the owner** for the purposes of the statute.

Any person who performs labor on any mining claim or claims, or in or upon any real property worked as a mine, either in the development thereof or in working thereon by the subtractive process, or furnishes materials to be used or consumed therein, has a lien upon the same and the works owned and used by the owners for milling or reducing the ores from the same, for the value of the work or labor done, or materials furnished by each respectively, whether done or furnished at the instance of the owner of such mining claim or claims or real property worked as a mine, or his agent.

And every contractor, sub-contractor, superintendent or other person having charge of any mining work or labor performed in and about such mining claim or claims or real property worked as a mine, either as lessee or under a working bond or contract thereon,

shall be held to be the agent of the owner for the purposes of the statute.

The liens in the statute provided for are direct liens,

And are not in the case of any claimants, other than the contractor, limited, as to amount, by any contract price agreed upon between the contractor and the owner, except as provided in the statute.

But said several liens shall not in any case exceed in amount the reasonable value of the labor done or material furnished, or both, for which the lien is claimed, nor the price agreed upon for the same between the claimant and the person by whom he was employed.

Nor in any case where the claimant was employed by a contractor, or sub-contractor, shall the lien extend to any labor or materials not embraced within or covered by the original contract between the contractor and the owner, or any modification thereof made by or with the consent of such owner, and of which such contract, or modification thereof, the claimant shall have had actual notice before the performance of such labor or the furnishing of such materials.

The filing of such original contract, or modification thereof, in the office of the county recorder of the county where the property is situated, before the commencement of the work, shall be equivalent to the giving of such actual notice by the owner to all persons performing work or furnishing materials thereunder.

In case said original contract shall, before the work is commenced, be so filed, together with a bond of the contractor with good and sufficient sureties in an amount not less than fifty per cent of the contract price named in said contract, which bond shall, in addition to any condition for the performance of the contract, be also conditioned for the payment in full of the claims of all persons performing labor upon or furnishing materials to be used in such work, and shall also by its terms be made to inure to the benefit of any and all persons who perform labor upon or furnish materials to be used in the work described in said contract, so as to give such persons a right of action to recover upon said bond in any suit brought to foreclose the liens provided for in the statute, or in a separate suit brought on said bond, then the Court must, where it would be equitable so to do, restrict the recovery under such liens to an aggregate amount equal to the amount found to be due from the owner to the contractor, and render judgment against the contractor and his sureties on said bond for any deficiency or difference there may remain between said amount so found to be due to the contractor and the whole amount found to be due to claimants for such labor or materials, or both.

No change or alteration of the work or modification of any such contract between the owner and his contractor shall release or exonerate any surety or sureties upon any bond given under this section.

It is the intent and purpose of the statute to limit the owners' liability, in all cases, to the measure of the contract price where he shall have filed or caused to be filed in good faith with his original contract a valid bond with good and sufficient sureties in the amount and upon the conditions as herein provided.

It is lawful for the owner to protect himself against any failure of the contractor to perform his contract and make full payment for all work done and materials furnished thereunder, by exacting such bond or other security as he may deem satisfactory. The owner is not obliged to rely upon the statutory bond for his own protection. He may require such further security for himself as he sees fit.

Any of the persons above mentioned as entitled to liens except the contractor, may at any time give to the owner a notice that they have performed labor or furnished materials, or both, to the contractor or other person acting by the authority of the owner, or that they have agreed to do so, stating in general terms the kind of labor and materials and the name of the person to or for whom the same was done or furnished, or both, and the amount in value, as near as may be, of that already done or furnished, or both, and of the whole agreed to be done or furnished, or both, and any of said persons who shall on the written demand of the owner refuse to give such notice shall thereby deprive himself of the right to claim a lien. Such notice may be given by delivering the same to the owner personally, or by leaving it at his residence or place of business with some person in charge, or by delivering it to his architect, or by leaving it at the latter's office with some person in charge. No such notice is invalid by reason of any defect in form, provided it is sufficient to inform the owner of the substantial matters provided for.

Upon such notice being given it is lawful for the owner to withhold, and in the case of property which, for reasons of public policy or otherwise, is not subject to the liens in the statute provided for, the owner or person who contracted with the contractor shall withhold from his contractor sufficient money due, or that may become due to such contractor; to answer such claim and any lien that may be filed therefor, including the reasonable cost of any litigation thereunder.

The owner is not obliged to retain the money claimed when he is so notified, but he is permitted to do so, if he choose, and is doubtful of the contractor's ability to pay.

The liens provided for in the statute are preferred to any lien, mortgage or other encumbrance which may have attached subsequent to the time when the building, improvement, or structure was commenced, work done, or materials were commenced to be furnished; also to any lien, mortgage, or other encumbrance of which the lien-holder had no notice, and which was unrecorded at the time the building, improvement or structure was commenced, work done, or the materials were commenced to be furnished.

Every original contractor, claiming the benefit of the law, **within sixty days** after the completion of his contract, and every person, save the original contractor, claiming the benefit of the law, **within thirty days** after he has ceased to labor or has ceased to furnish materials, or both, or, at his option, within thirty days after the completion of the original contract, if any, under which he was employed, must file for record with the county recorder of the county in which such property or some part thereof is situated a claim of lien containing a statement of his demand after deducting all just credits and offsets, with the name of the owner or reputed owner, if known, also the name of the person by whom he was employed, or to whom he furnished the materials, with a statement of the price, if any, agreed upon for the same, **and when payable,** and of the work agreed to be done and when the same was to be done, if agreed upon, and also a description of the property to be charged with the lien, sufficient for identification, which claim must be verified by the oath of himself or of some other person.

Any **trivial** imperfection in the work, or in the completion of any contract by any lien claimant, or in the construction of any building, improvement or structure, or of the alteration, addition to or repair thereof, is not deemed such a lack of completion as to prevent the filing of any lien.

And, in all cases, any of the following is deemed equivalent to a **completion** for all the purposes of the statute: The occupation or use of a building, improvement or structure by the owner or his representative; or the acceptance by said owner, or said agent, of said building, improvement or structure; or cessation from labor for thirty days upon any (original) contract or upon any building, improvement or structure, or the alteration, addition to, or repair thereof; the filing of the (owner's) notice provided for.

The owner may, **within ten days** after completion of any contract, or **within forty days** after cessation from labor thereon, file for record in the office of the county recorder of the county where the property is situated, a notice setting forth the date when the same was completed, or on which cessation from labor occurred, together with his name and the nature of his title, and a description of the

property sufficient for identification, which notice shall be verified by himself or some other person on his behalf. The fee for recording the same is one dollar. In case such notice be not so filed, then the said owner and all persons deraigning title from or claiming any interest through him shall be estopped in any proceedings for the foreclosure of any lien provided for in the statute from maintaining any defense therein based on the ground that said lien was not filed within the time fixed by the statute; provided, that **all claims of lien must be filed within ninety days** after the completion of any building improvement or structure, or the alteration, addition or repair thereto.

In every case in which one claim is filed against two or more buildings, mining claims, or other improvements owned by the same person, the person filing such claim must at the same time, designate the amount due to him on **each** of such buildings, mining claims, or other improvements; otherwise the lien of such claims is postponed to other liens. The lien of such claimant does not extend beyond the amount designated, as against other creditors having liens, by judgment, mortgage, or otherwise, upon either of such buildings or other improvements, or upon the land upon which the same are situated.

The recorder must record the claim in a book kept by him for that purpose, which record must be indexed, as deeds and other conveyances are required by law to be indexed, and for which he may receive the same fees as are allowed by law for recording deeds and other instruments.

No lien provided for in the Act binds any property for a longer period than **ninety days** after the same has been filed, unless proceedings be commenced in a proper Court within that time to enforce the same; or, if a credit be given, then ninety days after the **expiration of such credit;** but no lien continues in force for a longer time than **one year** from the time the work is completed, by any agreement to give credit, and in case such proceedings be not prosecuted to trial within two years after the commencement thereof, the Court may in its discretion dismiss the same for want of prosecution, and in all cases the dismissal of such action (unless it be expressly stated that the same is without prejudice), or a judgment rendered therein that no lien exists, is equivalent to the cancellation and removal from the record of such lien.

Any person who, at the request of the reputed owner of any lot in any incorporated city or town, grades, fills in, or otherwise improves the same, or the street or sidewalk in front of or adjoining the same, or constructs any areas, or vaults, or cellars, or rooms, under said sidewalks, or makes any improvements in connection

therewith, has a lien upon said lot for his work done and material furnished.

Every building or other improvement, or work constructed, altered or repaired upon any land with the knowledge of the owner or of any person having or claiming any estate therein, and the work or labor done or materials furnished with the knowledge of the owner or persons having or claiming any estate in the land, is held to have been constructed, performed or furnished at the instance of such owner or person having or claiming any estate therein, and such interest owned or claimed shall be subject to any lien filed in accordance with the provisions of the Act, unless such owner or person having or claiming any estate therein shall, within ten days after he shall have obtained knowledge of such construction, alteration or repair or work or labor, give notice that he will not be responsible for the same by posting a notice in writing to that effect in some conspicuous place upon the property, and shall also, within the same period, file for record a verified copy of said notice in the office of the county recorder of the said county in which said property or some part thereof is situated. Said notice shall contain a description of the property affected thereby sufficient for identification, with the name, and the nature of the title or interest of the person giving the same. Said copy so recorded may be verified by anyone having a knowledge of the facts, on behalf of the owner or person for whose protection the notice is given.

Any contractor is entitled to recover, upon a lien filed by him, only such amount as may be due to him according to the terms of his contract, after deducting all claims of other parties for work done and materials furnished, as aforesaid, and embraced within his contract.

In all cases where a lien shall be filed for work done or for materials furnished to any contractor, he must defend any action brought thereon at his own expense.

During the pendency of such action the owner may withhold from the contractor the amount of money for which such lien is filed; and in case of judgment against the owner or his property upon the lien, the owner shall be entitled to deduct from any amount due, or to become due, by him to the contractor, the amount of such judgment and costs.

If the amount of such judgment and costs shall exceed the amount due by him to the contractor, or if the owner shall have settled with the contractor in full, he is entitled to recover back from the contractor, or his bondsmen or sureties, on any bond given for the faithful performance of his contract, any amount so paid by

him, the said owner, in excess of the contract price, and for which the contractor was originally the party liable.

No act done by such owner in compliance with any of the provisions of the Act shall be held to be a prevention of the performance of any such contract by the contractor, or to have exonerated the sureties on such or any bond given for faithful performance, or for the payment of liens of persons performing labor or furnishing materials, or both; provided that such act was done **in good faith** and without design to injure or harass any one.

Whenever on the sale of the property subject to any of the liens provided for in the law, under the judgment or decree of foreclosure of such lien, there is a deficiency of proceeds, judgment for the deficiency may be docketed against the party personally liable therefor in like manner and with like effect as in action for the foreclosure of mortgages.

Any number of persons claiming liens may join in the same action, and when separate actions are commenced, the Court may consolidate them. The Court must also allow, as a part of the costs, the money paid for verifying and recording the lien, such costs to be allowed to each claimant whose lien is established, whether he be plaintiff or defendant, or whether they all join in one action or separate actions are consolidated.

Whenever materials shall have been furnished for use in the construction, alteration, or repair of any building or other improvement, such materials are not subject to attachment, execution, or other legal process, to enforce any debt due by the purchaser of such materials, except a debt due for the purchase money thereof, so long as in good faith, the same are about to be applied to the construction, alteration, or repair of such building, mining claim, or other improvement.

Nothing contained in the law will be construed to impair or affect the right of any person to whom any debt may be due for work done or materials furnished to maintain a **personal action** to recover said debt against the person liable therefor; and the person bringing such personal action may take out an attachment therefor, notwithstanding his lien, and in his affidavit to procure an attachment need not state that his demand is not secured by a lien; but the judgment, if any, obtained by the plaintiff in such personal action shall not be construed to impair or merge any lien held by said plaintiff; provided, only, that any money collected on said judgment shall be credited on the amount of such lien in any action brought to enforce the same.

It is not competent for the owner and contractor, or either of them, by any term of their contract, or otherwise, to waive, affect,

or impair the claims and liens of other persons, whether with or without notice, except by their written consent, and any term of the contract to that effect is null and void.

Any person who **wilfully** gives a false notice of his claim to the owner forfeits his lien. Any person who shall wilfully include in his claim work or materials not performed upon or furnished for the property described in the claims forfeits his lien.

No mistake or errors in the statement of the demand, or of the amount of credits and offsets allowed, or of the balance asserted to be due to claimant, nor in the description of the property against which the claim is filed, invalidates the lien, unless the Court finds that such mistake or error in the statement of the demand, credits and offsets, or of the balance due, was made with the intent to defraud, or the Court shall find that an innocent third party, without notice, direct or constructive, has, since the claim was filed, become the bona fide owner of the property liened upon, and that the notice of claim was so deficient that it did not put the party upon further inquiry in any manner.

X.

Trusts and Agency

I treat of these subjects together, for in many respects the law applies equally to each. A trustee has all the powers of a general agent for the property held by him added to his ownership. An agent many times has as high duties and responsibilities as a trustee.

First, as to trusts. These estates are of very ancient origin, and it would seem as if the law touching them should be fairly well known to all, but I doubt if there is any estate in land concerning which there is more doubt and confusion in the unprofessional mind. The very mention of the terms "trust" or "trustee" in connection with the title to land seems to cast a fog about the title in the popular mind.

The elementary notion of trusts was borrowed from the Roman law and was introduced into England under the name of "uses," during the reign of Edward III. They were designed to evade the law and were resorted to at first for mere purposes of fraud. The burdens of the feudal system were great and men would cover up their possessions in order to avoid them. It was not long after their introduction until the greater part of all the land in England was so held.

In the beginning these conveyances to use were made for the benefit of a third person, and when these were established as valid by the Chancellor, conveyances to use were made for the benefit of the original owner as where A conveyed to B for the use of A. This converted his legal estate, which was therefore subject to feudal burdens, into an equitable estate which was not known to the common law. This estate was upheld by the Chancery Courts and many frauds were committed and great injustice done. Various acts were passed from time to time, including the famous Statute of Uses passed in the reign of Henry VIII, and after a bitter warfare between the Courts of Law and the Chancery Courts the doctrine was finally settled that one may deed to a second person for the benefit of a third. That the second person has the **legal** title and the third person the **equitable** title. Through long years of enactments and decisions the law of trusts in land has been fairly cleared

and the former evils done away with. In this State these trusts are defined by statute and any attempted trust which does not fall within the classification of the statute is void.

There are classes of trusts which must be distinguished. An express trust sometimes called a "specific trust" is created by agreement of the parties expressed in the deed or a declaration of trust executed at the same time as the deed. It can be created only for certain purposes and within certain bounds as I shall show later. This express trust must not be confused with the trusts which the law imposes under certain conditions. Thus, one who wrongfully detains land is an involuntary trustee for the benefit of the owner. He has no powers whatever except to convey to the owner, so likewise, one who gains the land by fraud, accident, mistake, undue influence, the violation of an express trust or other wrongful act, unless he has some other and better right thereto. A resulting trust arises where one pays the consideration for a purchase and the title is taken in the name of another. Frequently a number of persons will unite in the purchase of land, taking the title in the name of one, for convenience. This one is a trustee for the others under a resulting trust. He has no powers except to convey to his co-owners. The trustee under a deed which attempts to create an express trust and fails of the statutory requirements, is a trustee under a resulting trust, for any person who has paid a consideration. No such trustee has any powers to deal with the property except to convey to the persons entitled to the land.

Suffice it to say that any trustee other than one under a valid express or specific trust in relation to real estate has no powers as such. Of course, one dealing with a trustee who has no notice of his trusteeship, in good faith and for a valuable consideration, is protected, but where one has notice of a trust of any character he is accordingly bound, and if he acquire title from any other than a trustee under a valid express trust, he but steps into the shoes of his grantor and himself becomes such trustee.

An instance of notice to a purchaser may be of value. A very interesting case is Hassey vs. Wilke, reported in 55 Cal., 525, in which Mrs. Hassey brought suit to have the defendant Wilke decreed a trustee for her in respect to certain real property, and to compel a conveyance of it to her. On the 10th of August, 1868, she and F. A. Hassey were husband and wife. On that day Hassey conveyed to her the property by deed of gift. This made the property her separate property, and the deed was recorded. Later F. A. Hassey, the husband, borrowed of Nicholas Luning $10,000.00, executed his note, and Mrs. Hassey, at the request of the husband, joined in a mortgage on the property to secure it. This mortgage

was foreclosed, and F. A. Hassey, the husband, furnished the money to one Burling to bid in the property. A sheriff's deed was issued to Burling and the next day he conveyed the property to the husband and this deed was recorded. Something like two years afterwards, Hassey, who was indebted to the defendant Wilke, executed to Wilke a deed for the property for the debt. Wilke testified that he had no actual knowledge of the fact that the land was the separate property of Mrs. Hassey, and that he did not examine the records. The Court held that in mortgaging her separate property to secure the payment of the husband's debt to Luning, between herself and husband, she was surety only, and that when the husband purchased the property through Burling at the foreclosure sale, he was but paying his own debt, and that he took the title to the property in trust for his wife, and that Wilke, who was deemed to have notice of these facts by the record, simply stepped into his shoes, and became a trustee under a resulting trust for Mrs. Hassey.

When one takes title from such a trustee with notice of the trust, he must see to the application of the proceeds and must know that they reach the one entitled thereto, and knowledge of the agent for such a purchaser is notice to the purchaser. A purchaser, however, from the trustee under a valid declaration of trust, authorized to sell, is not bound to see to the application of the purchase money, and where one buys from any other trustee without any knowledge of any existing equities, he takes the property discharged of equitable claims, as no implied or resulting trust can prejudice the rights of purchasers or encumbrancers for value and without notice of the trust.

Any notice or information received by an intending purchaser or encumbrancer that the one with whom he is dealing is not the real owner of the land is sufficient to take him out of the class of innocent purchasers, and if he take over the property where he has means of acquiring such knowledge on proper inquiry and fail to make such inquiry, he takes the same title as the trustee held and must account to the real owner.

Sharply distinguished from the class of trusts above treated of, is an express or specific trust created by the agreement of the parties, either set forth in the deed, or in a declaration of trust executed by the parties contemporaneously with the execution of the deed, and as a part of the same transaction.

It is of the utmost importance to know what stipulations and agreements can be made between the parties in such a trust. The laws of California in relation to trusts are rigid and many trusts which would be perfectly lawful in other jurisdictions are unlawful in this State by reason of the prohibition of the statute, or a failure

of the statute to authorize them. The Courts of this State have held repeatedly that no express trust in real estate is valid in California unless it be one of the classes enumerated in the statute, and that all trusts which are not specifically authorized by the statute are void in their creation. Thus many lawyers in other jurisdictions, not knowing of these decisions, are misled, thinking that the laws of this State are the same as their own. I may say that I cannot now recall one trust submitted to me which was drawn in another State, which did not fall within the prohibitions of our statute, and was void in some particular. The penalty for the avoidance of the statutes, or failure to comply with them is very severe.

If A make a deed to B for the benefit of C, and C has paid no consideration and the attempted trust to be created is not of a class allowed by the statute, A's conveyance is void and B has no title for any purpose, but should reconvey to A to clear the record. If, however, in this transaction C has paid a consideration, B holds it as a resulting trustee for C and must convey to him. Any one dealing with B with notice of the trust must see to it that the trust created is valid, otherwise the deed to him is of no effect, and he simply holds as a resulting trustee for the one owning the land.

If one makes his will and attempts therein to create a trust which is invalid, then as to that property he dies intestate, and the property goes to his heirs at law regardless of the will. In nearly all jurisdictions, if a trust be invalid by reason of prohibition of any statute, or of the common law, the trustee yet has title to carry out the trust as nearly as may be; at least he is vested with the title, but in this State under similar circumstances he is not, the deed to him being void.

An express trust may be void in the beginning, yet if the parties proceed under it and it be fully executed and carried out in all respects as equity would demand, then it can no longer be questioned, as the parties will not be allowed after they have once dealt with the property in accordance with the trust, to say that it was invalid. Likewise where an invalid trust is created by a will, and when the estate is distributed, the Court construes the will and carries its provisions into its decree of distribution, and the time has passed for appeal, that decree governs and supersedes the provisions of the will and is safe from attack when the land is in the hands of a purchaser for value.

A hard fought case is what is known as the "Fair Will Case." By his will, Fair undertook to create a trust during the lifetime of his son Charles, the property on Charles' death to be conveyed by the trustees to the children of Charles. As the will did not give to the children any interest until the death of Charles, the Court held

that the trustees could not convey a title to them, as under the statutory provisions a trust to convey was void. This statute has since been amended permitting such a trust, but it should appear by the deed, or will, that it is the intention at the time it takes effect, to give a present interest to those who are to finally receive the estate, subject only to the trust.

Remember then, that no express trust in real estate will be upheld unless it falls under the classes permitted by the statute.

Now as to these classes. Section 857 C. C. declares that express trusts may be created for any of the following purposes:

1. To sell real property and apply or dispose of the proceeds in accordance with the instrument creating the trust.

2. To mortgage or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon.

3. To receive the rents and profits of real property and pay them to or apply them to the use of any person whether ascertained at the time of the creation of the trust or not, for himself or for his family during the life of such person, or for any shorter term, subject to the rules of Title 2 of this part. Or

4. To receive the rents and profits of real property and to accumulate the same for purposes and within the limits prescribed by the same title.

As to the first clause. In a trust to sell real property it has been held that the power must be mandatory. It cannot be left to agreement whereby the powers of the trustee are taken away from him, as to say, that the trustee shall sell with the consent of the beneficiary or the consent of any other person. The trust need not recite that the property shall be sold forthwith, but it must appear that the property is to be sold. It may be expressed that the trustee shall sell at such time or on such terms as he shall deem best, and a price at which he shall sell may be fixed, yet the trust will be mandatory. It should appear from the trust agreement that the trustee shall make sale in any event in order to make the trust agreement valid. After the trust has been lawfully created thereafter the parties can do as they see fit in regard to sale or in the matter of any agreement relating thereto, but these matters must not appear in the declaration of trust, otherwise no title passes.

The instrument creating the trust must not provide for a disposition of the proceeds in any manner in which it would be unlawful to devote the land. In other words, if there be a valid trust to sell and the declaration should recite that the money should thereafter be held perpetually by the trustee, the whole trust is void as no trust can be created to exist longer than the lives of those in

being at the date of the creation of the trust and interested therein. A trust, however, may be invalid as to part and valid as to the remainder, in which case if the trusts can be separated, if they be not so interwoven that should one fall, all must fall, then the trust will not be held wholly void on that account. The trust must be certain in its terms. A trust for any period which is not fixed upon the life of some one in being at the time of its creation is void. As for instance, if the trust be created for a term of ten years without further limitation, it is void on the ground that there is a possibility of suspension of alienation. All of the parties interested may be dead the next hour after its creation.

A trust to continue to a date when a child is to become of age is void unless it be qualified with the statement that he live so long and that the trust shall terminate upon his death.

Any trust is void in its creation which by any possibility may suspend the power of alienation beyond the lives of those in being at the date of the creation and interested in the trust.

The power to mortgage or lease real property is for the benefit of annuitants or other legatees or for the purpose of satisfying any charge on the property. The trustee has not the power to lease for a longer time than the period of his trust unless the declaration permits it in terms, nor is he permitted to mortgage except for the purposes enumerated in the statute. A trustee cannot mortgage the property simply to furnish money to the beneficiaries if their demands do not fall in the above classification.

A trust to receive the rents and profits of the property is valid as a holding trust so long as any of the beneficiaries survive, but a trust to hold thereafter for the benefit of any issue not in being at the time of the creation of the trust is void as to such provision.

The trustee must pay out all of the net income and is not permitted to accumulate, except that the income payable to minors may be accumulated until they reach legal age. None of the above provisions apply to charitable trusts such as foundations for schools of learning or churches; they may be in perpetuity, but no other trust can exist longer than the life of the last survivor of the persons in being at the time of its creation and interested in the trust. Under the common law and in all States of the Union where the common law prevails, this term may be continued twenty-one years after the death of the last survivor.

When a valid express trust has been created the trustee is vested with the full legal and equitable title and the beneficiaries thereunder have no interest in the land, but only in the proceeds thereof, and this interest is personal property. The land is not subject to judgment or attachment against any of the beneficiaries.

Such a trust cannot be revoked by the creator unless he reserve that power in its creation.

A trust may be always terminated by the consent of all parties interested, but this does not mean that the trust can be terminated or altered after the death of the truster, for his consent can no longer be obtained, and the beneficiaries and the trustee cannot simply because they are dissatisfied with the trust agree among themselves that it shall cease or be altered.

It has been held, however, that in cases where the purpose of the trust has been accomplished and nothing remains to be done to carry out the will of the truster that the trust may be terminated by consent of all the beneficiaries and the consent of the trustee is not necessary. He holds but a dry, naked title which he can be compelled to convey. But this rule would not apply, in cases where it is sought to alter or defeat the intention of the truster after his death.

A trust to sell is not a trust to exchange. The statute does not in terms authorize an exchange, but where all parties to the trust agree upon an exchange and the trustee take property in exchange to be held upon the same trusts, the transaction would undoubtedly be valid, whether the trust agreement provided for an exchange or not. This, bear in mind, would require the consent of all, otherwise one who did not consent could attack the transaction and show that no power is given by the statute to a trustee to exchange. This exact point has not been before our Courts and I cannot hazard a guess as to whether it would hold a trust to exchange to be one within the statute. Our Supreme Court, however, has held that a power to sell is not a power to exchange.

The disposition of income received by the trustee cannot be left to his discretion as in a case where a testator directs his trustee to pay to a certain beneficiary such part of the income of the property as the trustee shall deem best. The income must all be paid out, except the income of minors which may be accumulated until they reach maturity. It must clearly appear that the real estate is to be sold in any event or a mandatory power of sale be given. These matters must not be left to the discretion of the trustee.

Spendthrift trusts are lawful in this State. That is to say, the truster may provide in the trust that the interest therein of any beneficiary shall not be subject to assignment or advancements, or the demands of any creditor, but this does not apply to a trust where the truster of the trust is the beneficiary under the trust. As should A deed to B and state that thereafter the income of the property was to be paid to A, and it should be free from all demands of creditors, this would be but an attempt to sequestrate his own

property, whereas if he make a valid trust for the benefit of a third person, he can make it upon such terms as he sees fit as to the use of it.

The beneficiary of a trust may be the trustee, but this is not good practice ordinarily, as Courts will very carefully scan the acts of a trustee who is acting in his own behalf. Where there are several trustees, all must act together, but in case any one or more of them is dead, the survivor or survivors may act unless it is otherwise prescribed by the terms of the trust. Upon the death or inability of a trustee to act or upon his resignation, the power falls upon the Superior Court, and a new trustee may be appointed upon petition. The trustee who has accepted an express trust cannot resign at his will, but must continue unless there is some good reason for his resignation, but where the trust is gratuitous he may resign at any time.

The trustee is entitled to compensation depending upon the circumstances of his trust. He cannot delegate his powers, but he may employ others to do purely ministerial acts. Cases have been known where a trustee has conveyed over to another person as trustee all the estate held by him, thus attemping to substitute a new trustee. This deed is futile to accomplish the purpose, as no trustee can delegate his powers. He has passed but a bare legal title, and a person so sought to be appointed has absolutely no power. A deed should be taken back from him to clear the record.

The beneficiaries under a trust take no estate or interest in the property as I have stated, but they may enforce the performance of the trust. Note the difference here between the effect of a conveyance to a trustee under a valid express trust authorized by the statute, and a deed given to a trustee to secure the payment of money. In the first instance, the trustee has the whole title at all times. In the second instance, the trustee has such title as is necessary to the trust and to protect it, and which does not come into force and vigor until the necessity arises. He has title at the time the hammer falls on foreclosure sale, and can pass the title to the buyer, but up to that time he has no title that he can deal with, as an owner, the real title resting in his grantor or his successor.

Where an express trust is in fact created, but which does not appear in the deed to the trustee, or in an instrument signed by him and recorded in the recorder's office, such grant must be deemed absolute in favor of purchasers from such trustee without notice of the trust, and for a valuable consideration. One who actually and in good faith transfers any money or other property to a trustee, as such, is not bound to see to the application thereof, and his rights can in no way be prejudiced by misapplication thereof

by the trustee. Other persons must at their peril see to the proper application of the money or other property delivered by them. Every transfer or other act of the trustee in contravention of the trust is absolutely void.

A trustee must fulfill the purposes of the trust as declared at its creation, and must follow all the directions of the truster given at that time, except as modified by the consent of all parties interested, in the same manner and to the same extent as an employe. A trustee whether he receive any compensation or not must use at least ordinary care and diligence in the execution of his trust, and he must look to it that before he resign or is discharged that a trustworthy successor be selected before accepting his own final discharge. He must invest money received by him as fast as he collects a sufficient amount in such manner as to afford reasonable security and interest for the same, and if he omits to do this he must pay simple interest thereon, if such omission is negligent merely, and compound interest if it is wilful. A trustee cannot enforce any claim against the trust property which he purchases after or in contemplation of his appointment as trustee, but he may be allowed by any competent Court to charge to the trust property what he has paid for the claim upon discharging the same. A discretionary power conferred upon the trustee is presumed not to be left to his arbitrary decision but may be controlled by the Court if not reasonably exercised unless an absolute discretion is clearly conferred by the declaration of trust.

A trustee cannot deal with a trust property for his own benefit, nor can he acquire any title adverse to the trust, nor take any other trust which is hostile to the one first held by him. A trustee is also held to the highest good faith and is responsible for the wrongful acts of a co-trustee to which he consent or which by his negligence he enabled the latter to commit. If he uses or disposes of the trust property in any manner not authorized by the trust, but in good faith, and with intent to serve the interests of the beneficiary he is liable to make good only what is lost to the beneficiary by his error. If he uses or disposes of the property for his own benefit he may at the option of the beneficiary be required to account for all profits so made with interest. He may not obtain an advantage over the beneficiary by the slightest misrepresentation, concealment, threat or adverse pressure of any kind, and he must not use influence which his position gives him to obtain any advantage from the beneficiary, and all transactions between the trustee and his beneficiary by which he obtains any advantage from his beneficiary are presumed to be entered into by the latter without sufficient consideration and under undue influence. The trustee who wilfully and

unnecessarily mingles the trust property with his own so as to make it appear that he is its absolute owner is liable for its safety in all events and for the value of its use.

Remember these things.

An express trust in real estate is void if it do not fall under the provisions of Section 857 C. C.

It is void in other than charitable trusts if the property is to be held perpetually, or the proceeds of any sale are to be held perpetually, or for any term, or to any date which might be beyond the lives of those in being at the creation of the trust and interested therein.

That a trust which by any possibility suspends the power of alienation beyond the lives of such persons is void in its creation.

That the power to sell given the trustee must be absolute and mandatory and not dependent upon the consent of any other person.

Remember that a trust for the accumulation of income except for the use of minors is void.

Remember that prior to August 10, 1913, a trust to convey over is void.

Remember that a deed to a person or persons as trustees for an unincorporated association vests the title in them individually. They have no trust power. They hold merely in trust for the individuals who furnish the money. Upon the death of one of the trustees, his interest descends to his heirs.

A leading case is Wittfield vs. Forster, 124 Cal., 418. Here a conveyance was made to a trustee for an unincorporated association, his successors and assigns forever, without further specification of the trust. In this case no consideration was paid. The Court held that the trust was invalid not falling under the Code and void for uncertainty, and Forster held as a resulting trustee for Wittfield, or his heirs, or else had no title at all. Had there been a consideration paid, Forster would have held for the one paying the consideration, but with no power except to convey to the real owner.

Remember that a trustee cannot create a trusteeship in another by conveying all the trust property to him.

Remember that a trust cannot be terminated or amended, only by the consent of all parties thereto, and if the trust be a gratuitous one as under a will and the truster be dead, the trust cannot be terminated or amended by agreement of the trustee and the beneficiaries unless its whole object be accomplished and there is nothing further to do in the matter.

Remember that a trustee's powers are measured by the terms of instrument creating the trust. A trustee has always power to do anything necessary to the preservation of the trust estate, but

these implied powers in cases of doubt should only be exercised under direction of a competent Court.

The discussion on agency will be confined to such agencies as pertain to real estate. There is a vast deal of law governing the subject and I cannot hope to touch on more than the salient features. Anyone capable of contracting may appoint an agent, and anyone may be an agent. Where the thing to be done by an agent is required by law to be an instrument in writing, the agent's authority must be in writing, and his powers are strictly measured by that written authority.

This authority is usually conferred by power of attorney. These instruments are strictly construed and the attorney has no implied powers, as has a trustee. He can act only within the scope of his authority as shown by the instrument. Much confusion arises and often loss is suffered by inapt language or omissions. It is a cardinal rule that such instruments should clearly express in terms what may be done by the attorney. If he has authority to convey, it must so appear as a power to sell does not give power to convey.

When the power of attorney is special, it cannot be enlarged by the general terms. The general terms are held to apply only to the incidents of the special power. Thus, if the power be to sell a certain piece of land, followed by the words "and to make, do and transact all and every kind of business of what nature and kind-soever" and "giving and granting unto my said attorney full power and authority to do and perform all and every act and thing necessary whatsoever requisite in and about the premises," these latter clauses do not authorize a conveyance by the attorney. They are held only to apply to his special power to sell. A power to mortgage does not imply a power to execute a trust deed, for the principal may well give a power to mortgage, whereby he has an equity of redemption after a foreclosure sale, and not intend to authorize a trust deed whereby he would lose that right. A power of sale is not a power to exchange, for obvious reasons. The principal may be satisfied with a cash sale, and yet not be willing to trust to his agent's judgment of property taken in lieu of cash. An attorney in fact, or other agent, cannot deal with the property for his own benefit without the consent of his principal and any attempt to do so is presumed to be fraudulent. The attorney in fact, cannot act in any manner without a full and adequate consideration moving to his principal unless it be otherwise stipulated in the power. An agency of any character can always be revoked by the principal, unless it be coupled with an interest held by the agent. One can pay a valuable consideration for an agency, or the agent may have an interest with his principal in the property which would be affected to the agent's

detriment upon revocation. In such cases the principal cannot revoke it without the consent of the agent, otherwise the agency is revoked at the pleasure of the principal. Automatically a revocation is worked by the death of the principal, upon his being adjudged incompetent or bankrupt. Likewise is the agency terminated upon the agent being adjudged incompetent, and if the powers and authority granted rest upon a personal confidence reposed in the agent, upon his being adjudged a bankrupt. One then dealing with an agent who presents his authority must examine the records and otherwise make inquiry if the authority has been revoked, or if it has been terminated by the death, incompetency or bankruptcy of the principal, or the incompetency or bankruptcy of the agent. The extent of this inquiry must be governed by the circumstances of the case.

An agent cannot delegate his powers to another unless authorized so to do by his written authority. He must deal in highest good faith with his principal and is held to account for everything he receives for his principal's account. Thus, where the contract is that A shall have the exclusive right to sell B's land for a certain sum, any amount received by A over and above that sum belongs to B, unless the contract is to the effect that A shall have as his own all over and above such sum. If you are taking a contract to sell property under such circumstances, and it is the agreement that you are to receive all over and above the set sale price, see to it that it is so set forth in the contract. When an agent for the sale of land has secured a purchaser ready, able and willing to purchase, or in case he is agent to procure a loan and secures a person who is ready, able and willing to make a loan, he has earned his commission, and it has been held that he has earned his commission when he has procured the consent of an intending purchaser or mortgagee to an offer of sale, exchange or to mortgage, if the contract provide in terms that he shall be so entitled upon procuring the mere consent of the acceptor. These are the cardinal rules, but the cases in which it is sought to enforce them are legion. They always hinge upon the facts and circumstances of the particular case, and it would serve no good end to cite instances here.

An exclusive agency, where there is a consideration paid for it by the agent, entitles him to commissions even when the land is sold by the principal, if the contract so recite, but if it do not so recite he is not. Unless the contract be given for a consideration it can be terminated at any time by the principal, but only when the principal is acting in good faith and before the agent finds a purchaser, and it may be revoked if the owner sell to one who is not a purchaser found by the agent. Where the agent acquires an interest

in the land along with the agency supported by a consideration, the agency cannot be revoked at the pleasure of the principal, but where his interest is only in the proceeds of sale and not in the land itself, it may be.

If an agent sells by an unrecorded map he cannot collect commission, as the act is unlawful.

Now, as to transactions which are popularly denominated "escrows." It must be borne in mind that a legal escrow is created by the deposit of a grant by the grantor with a third person, to be delivered on the performance of a condition certain. When this is done, the grantor has surrendered all dominion over the deed, and he cannot withdraw it. However, where such a deposit is made and there yet remains something to be agreed upon between the parties, in short, if the contract is not executed and completed, the depositary holds as agent for the grantor, and when the grantee deposits his papers or money, the depositary is then the agent for the grantee as well. When a deed is deposited in a legal escrow the authority of the depositary cannot be revoked without the consent of both parties, but where the instruments are deposited under such circumstances that constitute the depositary the agent, this authority is revocable. Bear in mind here the sharp distinction between an escrow which is an executed contract and nothing remains as a matter of agreement, and in a so-called "deposit in escrow" where the contract is executory and there remains further matters of settlement or agreement. In the first case the authority cannot be revoked by the grantor, and in the second case it can be.

The depositary being the agent of both parties, the principals of the contract are bound by all notices or matters coming to the knowledge of the depositary which affects their interest or the title. The depositary is held to the highest good faith. He must act in an absolutely impartial way, and not attempt to act as a judge between the parties. While it is true, that the instruments and money so deposited may be withdrawn at any time on demand of the one depositing, that is to say, this is his legal right, and he could enforce it by action, the depositary should not surrender the instruments or money after the conditions have been met and the parties have agreed. This as a business policy.

We will take a case where A deposits his deed with B, with instructions to deliver to C within ten days on the payment of the money, and to secure for him a note and mortgage for the balance of the purchase price. He can withdraw these instructions any time before B has met the conditions. At any time before the transaction is completed, and a contract executed, either party may demand a return of the documents or money, and the depositary

can surrender without laying himself liable. However, after the transaction is completed and everything is in the depositary's hands, and the contract is executed, all save the delivery of instruments, he should not surrender either documents or money without the consent of both parties, or in response to an order of Court.

It is a growing practice in this community to conduct real estate transactions in escrow. It is a highly commendable practice, one making for the safety of the parties, and should be encouraged. It is not advisable, I think, to tell your clients that when they have deposited their money or papers that they have lost control of them. It appears to me to be much better to have them know the respective rights of the parties, and for them to know what the duties and responsibilities of the depositary are.

Very frequently the parties disagree and fall apart in their negotiations, and each demands of the depositary that he do something for his benefit, as where having failed of agreement, the grantor insists that the escrow holder shall retain the money paid by the grantee until further orders from him, or the grantee demands that the deed be retained by the escrow holder. The duty of the escrow holder is, if possible, to obey the directions of both of his principals, but where he cannot do this, and the demands are conflicting he is entitled to keep all papers, suspend all operations under the escrow, and leave the parties to their legal rights.

In such an escrow as this the death of a principal terminates the agency. I would advise that in all cases a valid executory agreement for the sale and purchase of the land be first entered into and this agreement deposited with the papers in escrow. The depositary is a trustee for the parties, and as I have said must be fair and impartial. Many circumstances arise when the depositary by the exercise of good judgment can reconcile differences between the parties, and each particular case must be governed by its own circumstances. No iron bound rule can be laid down for the handling of such transactions, bearing in mind, however, that this one rule applies to all, that the escrow holder is the agent for both parties and owes both an equal duty.

XI.

Wills and Law of Succession

It must be borne in mind that upon the death of the wife before the husband, all the community property is vested in the husband without administration of her estate. Hers is but an expectancy during the life of the husband and dies with her. Upon the death of the husband, leaving a wife, one-half of the community property is vested in the wife, subject to payment of the debts of the community, and the husband can dispose of but one-half of the community by his will. If he attempt to dispose of all the community, the widow may claim her half or accept the provision of the will as she may elect, but it must plainly appear from the language of the will that the testator intended to deal with the **whole** of the community and not his half of it before she is required to elect. It has been held that where the testator devised "all my property" that he intended to devise only his half of the common property. If it clearly appear from the language of the will that he did intend to deal with the whole of it and the provisions of the will are inconsistent with the legal rights of the wife, she is put to an election. She cannot accept the benefits of her succession and of the will as well if they be inconsistent. As I have said, it must clearly appear, however, that it was the intent to put her to an election before she will be held to do so. The will should clearly show then that the testator intends to deal only with his separate property and his one half of the common property, if that be the intent. If otherwise, the will should so state that the widow will know of the testator's intent and act accordingly. Many instances occur in the books where sales have been made by the executor, either under power in the will, or by order of court, of the whole of the property and afterward the widow has recovered half of it from the purchaser or his successors. See to it then if you purchase land at an executor's sale that he is not attempting to sell the whole of the community without the widow's consent. The will does not operate on the homestead if it be such as vests absolutely in the survivor. Every other estate or interest in real or personal estate to which heirs, husband, widow or next of kin might suc-

PAPER FOR CITY AND COUNTY OF LOS ANGELES

RNIA, SATURDAY MORNING, SEPTEMBER 22 1923

CALIFORNIA CASES AND COMMENTS

Community Property Law: Rights of Husband and Wife: Under the community property law of this state prior to the adoption of 172a of the Civil Code (Stats. 1917) the wife had an equal interest and ownership with the husband in community property and the only particular in which their rights differed was in the fact that the statute constituted the husband the managing and sales agent and trustee of the community partnership and authorized him to sell and pass title to such property and exercise absolute control over the same; provided, however, that the husband could not make a gift of such community property, or convey the same without a valuable consideration, unless the wife, in writing, consented thereto.

Real property purchased by a husband after the adoption of section 172a of the Civil Code in the year 1917 (Stats. 1917, p. 892) with community money acquired before the adoption of said section, is to be regarded as having been acquired before the adoption of said section.

In the case of Elizabeth V. Roberts v. J. F. Weymeyer, 66 C. D. 177, an action was instituted by the plaintiff to have a deed from William A. Roberts to appellant declared null and void and to have the title to the property declared to be in her, on the ground that a conveyance of community property by a husband is void under section 172a of the Civil Code unless his wife joins in its execution. The action was commenced on February 21, 1920, within one year of the date of the recordation of the conveyance and also before a final decree of divorce was granted. The finding is that the land was purchased with community funds "substantially all earned and acquired prior to July 26, 1917," and we shall therefore assume that the funds were all acquired before the [illegible] for plaintiff, from which defendant takes

XI.

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It must be borne in mind that upon the death of the wife before the husband, all the community property is vested in the husband without administration of her estate. Hers is but an expectancy during the life of the husband and dies with her. Upon the death of the husband, leaving a wife, one-half of the community property is vested in the wife, subject to payment of the debts of the community, and the husband can dispose of but one-half of the community by his will. If he attempt to dispose of all the community, the widow may claim her half or accept the provision of the will as she may elect, but it must plainly appear from the language of the will that the testator intended to deal with the **whole** of the community and not his half of it before she is required to elect. It has been held that where the testator devised "all my property" that he intended to devise only his half of the common property. If it clearly appear from the language of the will that he did intend to deal with the whole of it and the provisions of the will are inconsistent with the legal rights of the wife, she is put to an election. She cannot accept the benefits of her succession and of the will as well if they be inconsistent. As I have said, it must clearly appear, however, that it was the intent to put her to an election before she will be held to do so. The will should clearly show then that the testator intends to deal only with his separate property and his one half of the common property, if that be the intent. If otherwise, the will should so state that the widow will know of the testator's intent and act accordingly. Many instances occur in the books where sales have been made by the executor, either under power in the will, or by order of court, of the whole of the property and afterward the widow has recovered half of it from the purchaser or his successors. See to it then if you purchase land at an executor's sale that he is not attempting to sell the whole of the community without the widow's consent. The will does not operate on the homestead if it be such as vests absolutely in the survivor. Every other estate or interest in real or personal estate to which heirs, husband, widow or next of kin might suc-

18 years, of sound mind may dispose of property by will. A will or part of a will procured to be made by duress, menace, fraud, or undue influence may be denied probate and a revocation procured by the same means may be declared void.

A married woman may dispose of all her separate estate by will without the consent of her husband. Any person capable by law of taking property may take under a will, except that corporations other than counties, municipal corporations, and corporations formed for scientific, literary, or solely educational or hospital purposes cannot take under a will unless expressly authorized by statute.

No estate can be bequeathed or devised to any charitable, or benevolent society, or corporation, or to any person or persons, in trust for charitable uses, except the same be done by will duly executed at least 30 days before the decease of the testator, and no such devises, or bequests shall collectively exceed one-third of the estate of the testator, leaving legal heirs, and in such case pro rata deduction shall be made to reduce the aggregate to one-third of the estate, and all disposition contrary to the statute is void and the property goes to the residuary legatee or devisee, next of kin, or heirs according to law. As these prohibitions are in the interest of these people they may be waived and after the time for attacking the trust has passed, such devises or bequests would stand.

Now, as to execution of wills. An holographic will is one that is entirely written, dated and signed by the hand of the testator himself. It is not subject to any other form and may be made in or out of this State, and need not be witnessed. Here I call attention to certain dangers. The statute must be exactly met or such a will is void. Observe that it must be **entirely written, dated and signed** by the hand of the testator himself. It cannot be typewritten, and if the paper contain anything not written by the hand of the testator, such as a date line or letter head, it is annulled. A recital in the body of an holographic will such as "I," "A," etc., has been held to be sufficient signing, even if it be not signed at the end, but this does not apply to other wills which must be signed at the end. More litigation over estates has arisen, and more property diverted contrary to the intent of the owner through the practice of the testator drawing his own will than from any other reason. In such a solemn and important act one should have the best of guidance, for after the testator be dead his acts and intentions are to be determined from the cold words of his will. No court can read language into a will. The one who spoke

the words cannot be heard. The law and public policy permits persons to dispose of their worldly goods within certain limits, but it must always be remembered that it is an indulgence granted by the state and that a dead man owns nothing. One should at least give a share of the caution and care in the disposal of his estate that he exercises in acquiring it. You will not accept a deed until you are satisfied it conveys a title to you. If you sincerely desire it to pass to your beneficiaries, freed of entanglements, common prudence should prompt you to take the same precautions. The books are full of cases where men have defeated their purposes by not knowing the elemental rules which govern wills. The rules are simple enough, but they are vital. Do not attempt to draw your own will unless the emergency be great. If you do, see to it you use an absolutely blank paper, and see to it that no other hand than your own is set upon it.

Instances are very rare where nuncupative, or unwritten wills are probated, yet they are allowed in this State under certain circumstances. The requisites of such a will are that the estate bequeathed must not exceed in value $1,000. It must be proved by two witnesses who were present at the making thereof, one of whom was asked by the testator at the time to bear witness that such was his will, or to that effect. The decedent must at the time have been in actual military service in the field, or doing duty on shipboard at sea, and in either case in actual contemplation, fear or peril of death, or the decedent must have been at the time in expectation of immediate death from an injury received the same day. Such a will cannot be probated unless proof is offered within six months of speaking the testamentary words, nor unless the words or substance thereof be reduced to writing within thirty days after they are spoken.

A will should clearly identify the testator. He should state whether he be married or single, what descendants he has, and if the property to be disposed of is separate or community. While these statements are not conclusive, they are of great value in determining the intent of the testator, as where he attempts to dispose of the community property as a whole. The language should be simple and direct and such as no man can misunderstand. The will should in terms revoke all former wills theretofore made. The revocation of a former will works revocation of all codicils as well. The last expression of a testator is deemed to be his true intent.

No will made out of this State is valid as a will in this State unless executed in accordance with the statutes of this State, except that where a will is executed by a non-resident in accord-

ance with the laws of his place of domicile at the time of his death, is valid in this State so far as the same relates to personal property, except as to prohibitions against devise for charitable and other similar uses as above outlined.

Foreign wills which have been admitted to probate in another jurisdiction may be admitted to probate here upon production of the record of the original probate and have the same effect as if probated here originally, but this does not mean that a devise which would be valid as to real estate in the foreign country would be given effect here if contrary to our statutes.

Every will, other than a nuncupative will must be in writing and every will other than a holographic will and a nuncupative will must be executed and attested as follows:—

1. It must be subscribed **at the end thereof** by the testator himself, or some one in his presence and by his direction who must subscribe his name thereto.

2. The subscription must be made in the presence of the attesting witnesses, or be acknowledged by the testator to them to have been made by him or by his authority.

3. The testator must at the time of subscribing or acknowledging the same declare to the attesting witnesses that the instrument is his will, and there must be two attesting witnesses each of whom must sign the same as a witness **at the end** of the will at the testator's request **and in his presence.** An attestation clause is not essential, but it is good practice to affix one as it is at least prima facie evidence of the facts.

I suggest the following form of attestation clause:

"The above and foregoing instrument was on this..... day of.....signed by John Doe in our presence and the said John Doe at the time of such signing, declared the same in our presence to be his last Will and Testament, and we at the request of said testator, and in his presence, and in the presence of each other, have signed our names as subscribing witnesses thereto." Then follow with names of witnesses and place or residence of each.

A person who writes the name of the testator by his direction must sign as a witness and should state the fact. All beneficial devises, legacies, and gifts whatever made or given in any will to a subscribing witness thereto are void, unless there are two other competent subscribing witnesses to the same, but a mere claim of a creditor against the estate does not prevent the creditors from being competent witnesses.

If a witness to whom any beneficial devise, legacy or gift, void by the statute, is made would have been entitled to any share of

the estate if the will should not be established he succeeds to so much of the share as would be distributed to him, not exceeding the devise or bequest made to him in the will, and he may recover the same of the other devisees or legatees in proportion to and out of the parts devise or bequeathed to them.

The witnesses to a will should be those persons who would be competent witnesses in any action. Their subsequent death or incompetency does not prevent the probate of the will as the Court can always take other testimony. The law throws about the execution of the will certain formalities to prevent frauds. If you are called upon to witness the execution of a will see to it that you are not a beneficiary thereunder. Sign it only in the presence of the testator, or upon acknowledgment to you of his signature and at his request and after declaration by him that it is his will. Otherwise you will render the execution void.

A prior will is not revoked by a subsequent will unless the latter contains an express revocation, or contains provisions wholly inconsistent with the terms of the former will; but in other cases the prior will remains effectual so far as consistent with the provisions of the subsequent will, and if, after making a will, the testator duly makes and executes a second will, the destruction, cancellation, or revocation of such second will does not revive the first, unless the intent to do so appears. If, after having made a will the testator marries, and has issue of such marriage, born either in his lifetime or after his death, and the wife or issue survives him, the will is revoked, unless provision has been made for such issue by some settlement, or unless such issue be provided for in the will, or in such way mentioned therein as to show an intention not to make such provision.

If, after making the will the testator marries, and his wife survive him, the will is revoked, unless provision has been made for her by marriage contract, or unless she is provided for in the will or in such a way mentioned therein as to show an intention not to make such a provision.

A will made by a woman is revoked by her subsequent marriage and is not revived by the death of her husband. A contract of sale or a mortgage by the testator is not a revocation, neither is a deed before his death whereby his interest is not wholly divested before his death, but if he so express an intent in the instrument, or it be by its terms inconsistent with the testamentary disposition, it is a revocation. Whenever a testator has a child born after the making of the will either in his lifetime, or after his death, and dies leaving such child unprovided for by any settlement, and neither provided for nor in any way

mentioned in his will the child succeeds to the same portion of the estate that he would have taken had the ancestor died without making a will, and where he omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child or the issue of such child has the same share in the estate as if the ancestor had died intestate, but in all such cases the share must be taken from property not disposed of by the will, and if that be not sufficient all legatees and devisees must contribute ratably. This succession does not affect the validity of any sale made by the executor under power of sale in the will. If such children, or their descendants so unprovided for had an equal proportion of the testator's estate bestowed upon them in the testator's lifetime by way of advancement, they take nothing by virtue of these provisions of the statute. When any estate is devised or bequeathed to any child, or other relation of the testator and he die before the testator leaving lineal descendants such descendants take the estate as given to the one so dying.

Except in the cases above mentioned, no will, nor any part thereof, can be revoked or altered otherwise than: by a written will, or other writing of the testator, declaring such revocation or alteration and executed with the same formalities with which a will is executed or by being burned, torn, canceled, obliterated or destroyed with the intent and purpose of revoking the same by the testator himself, or by some one in his presence, and by his direction and when this is done by one other than by the testator himself at his direction it must be proved by two witnesses.

Words in a will referring to death or survivorship simply, relate to the time of testator's death, unless possession is actually postponed when they must be referred to time of possession. If a devisee, or legatee die during the lifetime of the testator, the disposition to him fails unless an intention appears to substitute some other in his place, except when the devisee or legatee so dying is a child or other relation of the testator, leaving lineal descendants. In such case such descendants take.

It must be remembered that the estate of a decedent is first subjected to the payment of his debts before he is permitted to bestow benefactions. It therefore becomes important to know in what order the beneficiaries stand. Frequently it is desired that one shall have the main benefit as to all the estate not otherwise disposed of. When such is the case, care should be taken that the whole estate, or the main portion thereof is not disposed of by specific gifts, legacies, or devises, for these take precedence. You might subject the main portion of the estate to the payment

of the costs and expenses of administration and the payment of your debts, when you did not so intend. We will take a single case.

A desires by special mention to bestow a gift on a certain friend. He says I give to B $5,000.00, or a certain piece of land. All the rest and residue of my estate I give to my son. Here he has given precedence to B over his son, for the property which would be first subjected to the costs and debts would be that of the son. The beneficiaries do not share ratably. The statute prescribes in what order the debts shall be paid and who pays. First comes the expenses of administration and the family allowance if any. They take precedence over all claims. Next the property of the estate is subjected in this order.

1. The property which is expressly appropriated by the will for the payment of debts.
2. Property not disposed of by the will.
3. Property which is devised or bequeathed to a residuary legatee.
4. Property which is not specifically devised or bequeathed and,
5. All other property ratably.

The same rules apply to legacies. Legacies to husband, widow, or kindred are chargeable for debts and expenses only after legacies to persons not related to the testator. The legacies to strangers must be exhausted before recourse be had to those of the kindred. Legacies are due and deliverable at the expiration of one year after testator's decease. Annuities commence at testator's decease. Legacies bear interest after one year from testator's decease, except that legacies for maintenance or to the testator's widow bear interest from his death. One may make a gift of personal property in view of death and even if the same property be otherwise disposed of by a will made either before or after the gift is made, the gift is not affected by the will, unless the gift be revoked. A verbal gift is not valid, unless the means of obtaining possession and control of the thing are given. Nor, if it is capable of delivery then, until it is delivered. A valid gift, other than a gift in view of death, cannot be revoked by the giver. A gift in view of death is one which is made in contemplation, fear or peril of death, and with intent that it shall take effect only in case of the death of the giver, and a gift which is made during the last illness of the giver or under circumstances which would naturally impress him with an expectation of a speedy death is presumed to be a gift in view of death. A gift in view of death may be revoked by the giver at any time, and is revoked by his

recovery, from the illness, or escape from the peril under the presence of which it is made or by the occurrence of any event which would operate as a revocation of a will made at the same time, but if the gift has been delivered to the donee then a bona fide purchaser from him, the donee, before the revocation is not affected by the revocation. This sort of gift is treated as a legacy where the creditors of the giver are to be satisfied. The property is subject to their claims.

The right of a purchaser or encumbrancer of real property, in good faith and for value, derived from any person claiming the same by succession are not impaired by any devise made by the decedent from whom succession is claimed unless within four years after the devisor's death, the instrument containing such devise is duly proved as a will and recorded in the office of the clerk of the Superior Court, having jurisdiction thereof, or written notice of such devise is filed with the clerk of the county where the real property is situated. This has no bearing I take it, where an administration has been had, and a decree of distribution has been entered, and time for appeal has passed all within the period of four years after the death of the one from whom succession is claimed, for these proceedings are final and conclusive, and no subsequently discovered will could be probated after this has been done. But instances occur where one purchases from another who claims as a successor from an ancestor. No probate is had for four years after the death of the ancestor or the probate is not completed within that period. No will of the deceased is effective against this purchaser from the heir, in good faith and for value, unless the same be proved and recorded within four years from the decedent's death. This means that one who purchases from an heir during administration takes subject to the administration, and if the administration be not complete such a purchaser runs the risk that a will may be produced, depriving his grantor of any interest within four years of the decedent's death.

I shall not go into any of the proceedings leading up to probate of wills or the appointment of executors or administrators. Suffice it to say that after probate of a will anyone in interest may contest it and if no contest be made within one year the probate is conclusive, except that infants and persons of unsound mind have one year after their disability be removed to attack the will, but this does not mean that they can follow the property into the hands of an innocent purchaser for value. If their rights have been invaded by the probate of the will they have the equitable right for one year after their disability is re-

moved to sue for the land if they find it in the hands of the original distributees, or to follow the proceeds of sale, if the property has been sold to innocent purchasers for value.

All acts of an administrator which have been approved by the Court, or are in ordinary course of administration, are not invalidated by the production of a will after his appointment. Thus, a purchaser at an administrator's sale is protected, if it be subsequently learned that the deceased left a will. Where money is on deposit in a bank not to exceed one thousand dollars, it may be paid out under certain conditions, and upon certain affidavits. It would serve no good purpose to recount these matters here as the law is apt to be changed at any session of the legislature. One can always be guided by the bank's requirements. When an executor named in a will fails to qualify, or in cases where no executor is named in the will, an administrator with the will annexed will be appointed. By the Code he is given the same authority over estates as an executor would have, and these acts are as effectual for all purposes. These powers, however, have been construed by the Courts as to extend only to such cases where the duties of the executors are mandatory and do not lie in discretion of the executor, or to matters necessary to the administration, such as payment of debts, family allowance, and costs of administration. In all other cases he must file a petition if it be necessary or desirable to sell the real estate of the deceased even if a power of sale be given by the will to the executor.

Now, as to succession, where the decedent die without making a will. Remember that one-half of the community property belongs to the wife on the death of the husband, but subject to administration and payment of the debts of the community. Remember that upon death of the wife before the death of her husband the community property vests in the husband without administration. Remember that where a homestead is declared in the lifetime of the deceased upon the community property by either spouse, or upon the separate property of the spouse who declares it, or consents to it, then upon the death of either spouse it vests absolutely in the survivor, and is no part of the estate. It is, however, to be subjected to the claims of creditors, over and above the $5,000 exemption under proceedings outlined under our paper on Homesteads.

A child legally adopted is an heir. Every illegitimate child is the heir of the person who, in writing, in the presence of a competent witness, acknowledges himself to be the father of such child; and in all cases is the heir of his mother; and inherits his or her estate, in whole or in part, as the case may be, in the same

manner as if he had been born in lawful wedlock; but he does not represent his father or mother by inheriting any part of the estate of his or her kindred, unless before the death of such child, his parents have intermarried and his father, after such marriage, acknowledges him as his child or adopts him into his family, in which case such child and all the legitimate children are considered brothers and sisters.

The estate of one who has been legitimated as above, and who dies intestate, is succeeded to as if he had been born in lawful wedlock. If he has not been so legitimated, and he dies intestate, his estate goes to his issue, if he leave issue; if not, to his mother, or if she be dead, to her heirs.

There is no distinction between children of the half and whole blood, unless the inheritance come to the decedent by descent, devise, or gift from some of his ancestors, in which case all of those who are not of the blood of such ancestors are excluded.

Any advancements of any estate, real or personal, given by the decedent in his lifetime to any heir is a part of the estate of the decedent for the purposes of division, and must be taken by such heir as his share of the estate. These advancements can only be enforced if the one making them has expressed them as such in writing, or the one receiving them has acknowledged them as such. If they exceed the amount the heir would be entitled to on distribution the excess cannot be recovered from him, but if they be less he is entitled to so much more as will give him the full share of the estate and these matters are true if the heir die before the ancestor as applied to his representatives.

This representation occurs when the descendants of any deceased heir take the same share or right in the estate of another person that their parents would have taken if living. A child born after the death of the father is in this class. Resident aliens may take in all cases as civilians, but non-resident aliens under a will, or by the laws of succession, must appear and claim their inheritance within five years after the death of the decedent, or his share in the estate is forfeited to the state. Bearing in mind, then that either spouse may by will dispose of his or her separate property, and the husband his half of the community property, as he or she sees fit, provided the will does not contravene the rules above set forth, we will pass to the Law of Succession, which applies when either spouse dies without leaving a will. Upon the death of the wife before her husband's death there is no succession of the community property, the law operating only upon her separate property. Upon the death of the husband the law operates upon his half of the community, his separate property, and the wife's half of the com-

munity only so far as it is subject to the rights of creditors. This half belongs to her not by succession, but by reason of her ownership, but it is subject to debts of the community, as indeed it is when the wife die before the husband. Upon death then without will the separate property of either spouse and the one-half of the community belonging to the husband except where limited by marriage contract, descends as follows:

1. If the decedent leaves a surviving husband or wife, and only one child, or the lawful issue of one child, in equal shares to the surviving husband, or wife and child, or issue of such child. If the decedent leaves a surviving husband or wife, and more than one child living, or one child living and the lawful issue of one or more deceased children, one-third to the surviving husband or wife, and the remainder in equal shares to his children and to the lawful issue of any deceased child, by right of representation; but if there is no child of decedent living at his death, the remainder goes to all of his lineal descendants; and if all of the descendants are in the same degree of kindred to the decedent, they share equally, otherwise they take according to the right of representation. If the decendent leaves no surviving husband or wife, but leaves issue, the whole estate goes to such issue; and if such issue consists of more than one child living, or one child living and the lawful issue of one or more deceased children, then the estate goes in equal shares to the children living, or to the child living and the issue of the deceased child or children by right of representation.

2. If the decedent leaves no issue, the estate goes one-half to the surviving husband or wife, and the other half to the decedent's father and mother in equal shares, and if either is dead the whole of said half goes to the other. If there is no father or mother, then one-half goes in equal shares to the brothers and sisters of decedent and to the children or grandchildren of any deceased brother or sister by right of representation. If the decedent leaves no issue, nor husband nor wife, the estate must go to his father and mother in equal shares, or if either is dead then to the other;

3. If there is neither issue, husband, wife, father, nor mother then in equal shares to the brothers and sisters of decedent and to the children or grandchildren of any deceased brother or sister, by right of representation;

4. If the decedent leaves a surviving husband or wife, and neither issue, father, mother, brother, sister, nor the children or grandchildren of a deceased brother or sister, the whole estate goes to the surviving husband or wife;

5. If the decedent leaves neither issue, husband, wife, father, mother, brother, nor sister, the estate must go to the next of kin, in

equal degree, except in that, when there are two or more collateral kindred, in equal degree, but claiming that through different ancestors, those who claim through the nearest ancestor must be preferred to those claiming through an ancestor more remote;

6. If the decedent leaves several children, or one child and the issue of one or more children, and any such surviving child dies under age and not having been married, all the estate that came to the deceased child by inheritance from such decedent descends in equal shares to the other children of the same parent and to the issue of any such other children who are dead, by right of representation;

7. If, at the death of such child, who dies under age, not having been married, all the other children of his parents are also dead, and any of them has left issue, the estate that came to such child by inheritance from his parent descends to the issue of all other children of the same parent; and if all the issue are in the same degree of kindred to the child, they share the estate equally, otherwise they take according to the right of representation;

8. If the deceased is a widow, or widower, and leaves no issue, and the estate, or any portion thereof, was common property of such decedent, and his or her deceased spouse, or such spouse was living, such property goes in equal shares to the children of such deceased spouse and to the descendants of such children by right of representation, and if none, then one-half of such common property goes to the father and mother of such decedent in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such decedent and to the descendants of any deceased brother or sister by right of representation, and the other half goes to the father and mother of such deceased spouse in equal shares or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such deceased spouse and to the descendants of any deceased brother or sister by right of representation. If the estate, or any portion thereof, was separate property of such deceased spouse, while living, and came to such decedent from such spouse by descent, devise, or bequest, such property goes in equal shares to the children of such spouse and to the descendants of any deceased child by right of representation, and if none, then to the father and mother of such spouse, in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such spouse and to the descendants of any deceased brother or sister by right of representation.

9. If the decedent leaves no husband, wife or kindred, and there are no heirs to take his estate or any portion thereof, under

subdivision eight of this section, the same escheats to the State for the support of the common schools.

It will be observed that if the decedent die leaving neither issue, husband, wife, father, mother, brother nor sister, the estate goes to the next of kin in equal degree. The degree of kindred is established by the number of generations, and each generation is called a degree. The series of degrees form the line, and the series between persons who do not descend from one another but spring from a common ancestor, as in case of brothers and sisters, constitute collateral kindred. In the collateral line the degrees are counted by generations, from one of the relations up to the common ancestor, and from the common ancestor to the other relation. In such computation the decedent is excluded, the relative included and the ancestor counted but once. Thus brothers are related in second degree, uncle and nephew in the third degree, first cousins in the fourth degree, and so on. In the direct line there are as many degrees as there are generations. Now, where the decedent dies leaving no husband, wife, issue, father, mother, brother nor sister, the estate goes to the collateral kindred of the same degree. Thus where one die leaving Mary, Richard and Lucy, children of a deceased brother, Edward, a son of a deceased brother, and James, a grandson of a deceased brother, this grand nephew takes nothing and the others take all in equal shares, they being in the third degree; James being in the fourth degree. Likewise, those who succeed take in equal shares, not by right of representation, but per capita. This construction has lately been put upon the section in Estate of Nigro (51 C. D. 505.)

Likewise, under subdivision 3 of the section, which is that if there is neither issue, husband, wife, father nor mother, then in equal shares to the brothers and sisters of decedent and to the children or grandchildren of any deceased brother or sister by right of representation. It has been held in Estate of Ingram (78 Cal. 586) that the children or grandchildren of a deceased brother or sister cannot inherit unless there be a brother or sister of decedent surviving. The Court says it is vain to argue against the injustice of the rule as succession to estate is purely a matter of statutory regulation.

Clause 8 of this section is of great interest, for it is therein provided that if the decedent be a widow or widower and die without issue, and if the property of which the decedent died seized was the separate property of a deceased spouse, while living, and came from the deceased spouse by descent, devise or bequest the property does not go to the heirs of the one who died seized of it, but descends to the heirs of the deceased spouse. The one who receives

it from the deceased spouse has a full title which he or she can convey or dispose of by will, but not having done either, and dies without issue, the property falls into the line of descent from the spouse whose separate property it was.

If the estate be of less net value than $1,500.00, and there be a widow, or a minor child, or minor children, the whole estate can be set apart, subject to the incumbrances, to the widow if there be a widow. If not, then to the minor child or children. The person to whom it is so set apart is the owner free of claims of general creditors.

Claims must be filed in the estate or they are forever barred. The time for filing is four months from date of first publication of notice to creditors, when the estate is of less value than $10,000.00, and ten months if the estate exceed said sum. Claims which are not due should be presented as contingent claims, else the heirs will not be bound after the estate is settled. Mortgages on the homestead must be presented or the right of foreclosure is lost. Mortgages on other lands need not be presented if the mortgagee waive the right to a deficiency judgment.

Since 1893 all the estates of deceased persons have been subject to an inheritance tax. The Act of March 23rd, 1893, did not tax direct heirs. This Act remained in force until 1905. The law was again revised in 1911 and 1913 and again in 1915. The law in force at the death of the decedent determines the rate of tax chargeable against any inheritance. Since inheritance taxes due are often not paid until some years following the death of the decedent, it is important to ascertain what interests are taxable and what the rates of exemptions are after any time since the passage of the first Act. These rates and exemptions are too voluminous to include here. Reference must be made to the Acts themselves.

The present Act defines "estate and property" to mean real and personal property or interest therein of the testator, grantor, bargainor, vendor or donor passing or transferred to individual legatees, devisees, heirs, next of kin, grantees, donees, vendees or successors, and shall include all personal property within or without the State. The word "transfer" as used in the Act shall be taken to include the passing of property or any interest therein, present or future, by inheritance, devise, succession, bequest, grant deed, bargain, sale or gift. At present as the law stands, a tax is imposed upon the property when it vests in the survivor of a joint tenancy or the succession after the death of a life tenant, or the vesting of a homestead in the survivor.

Upon the death of the decedent, all his property vests immediately in his heirs if he die without making a will, and in his devisees

if he make a will. A devise may be made of the property to a trustee which will vest all the title in the trustee upon the death of the testator, but in all cases these ownerships are subject to the administration of the estate. Therefore, when one deals with an heir or a devisee before the estate be closed and distributed either by purchase or by making a loan, he runs the risk of losing the property or security, as it can always be taken to satisfy creditors.

A devise may be made to a trustee of the full title with power of sale, without order of Court or without confirmation of Court, but where the mere power of sale in the will is given to an executor, the sale can be made without order of Court therefor, but it must be confirmed by the Court. It is the safer and better practice where an administrator with will annexed is making the sale, to first secure an order of Court for sale, even if the will gives a power of sale, for he can sell only for administrative purposes and the necessity of such a sale is always a matter of proof.

No administrator or executor, unless he is given the power in the will, can deed or mortgage the property of the estate without an order of Court, and the instruments must show his authority. Any sales made by order of Court by an administrator are under proceedings fixed by the statute, and these statutes must be strictly followed. It is incumbent upon a purchaser at an administrator's or executor's sale to see that all the steps leading up to the sale have been properly taken, as the purchaser buys at his peril. He must see to it that, if the community interest of the wife is being sold that it is with her consent, or that it is necessary to the payment of costs of administration and debts of the community. If it be found that the sale is being made of her interest, require from her a deed. These same cautions apply where the property is homestead.

Remember these points.

Any person over the age of 21 years may be an executor. It is not required that executors be residents of this State. No non-resident, however, can be appointed administrator of an estate.

If there are two or more executors acting, each is liable for the acts of the other.

Remember that an administrator cannot make a deed or mortgage of the property of an estate without order of Court.

Remember that the deed made by an heir or devisee before the estate is distributed may be defeated by an administrator or executor's sale to pay debts or legacies.

Remember that the husband cannot dispose of his wife's community interest in the property by will, nor deprive her of the homestead.

Remember that in trusts created in wills other than charitable

trusts that they cannot be for a longer period than the life of the survivor of those in being at the time of the death of the decedent and interested in the trust, and that no accumulations of income are permitted except for the benefit of minors.

And do not, and this is a final word, become the "Best Friend of the Lawyer," "the man who draws his own will."

ADDENDA

On May 23, 1916, after this work had gone to press, the District Court of Appeals held in the case of Crowley vs. Savings Union Bank and Trust Company (22 App. 921) that in cases where a note and mortgage runs to husband and wife, that each takes a half thereof by reason of the provisions of Section 164 C. C. to the effect that whenever property is conveyed to a married woman and to her husband, the presumption is that wife takes as tenant in common. In cases where the note and mortgage runs to a married woman and another, or to husband and wife, you should require a release from both mortgagees and you should pay the proceeds one-half to each.

This rule does not apply in cases where the note and mortgage express in terms that same are held as joint tenants with the right of survivorship.

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And do not, and this is a final word, become the "Best Friend of the Lawyer," "the man who draws his own will."

Mr. F. V. Gordon,
Mr. Gerald A. Rogers,
701 Union Oil Bldg.,
Los Angeles, Calif.

Gentlemen:

In ordering Certificates of Title in Los Angeles County or Orange County, for use with Oil Leases or Oil Land, it will be well for us to bear this in mind:

That the Certificate of Title forms now in use, as printed, bear a notation which is in substance this:

> "This guarantee does not include an examination of, or a report on: . . . . Exceptions and rights reserved in United States patents, . . . mining claims."

To counsel in this community this exception is not of much importance, for we generally know that the land is Spanish Grant Land, to which no such exception would apply, or else we know that the land, if patented, does not carry any reservation in the Government. Eastern counsel who may review our papers, for the Com onwealth or others, may not know this and the exception might cause inquiry from them and consequent delay and annoyance.

March 5, 1920

Mr. O. Rosenbaum,
San Juan Capistrano,
California.

Dear Dad:

Re. TAX TITLES.
(Answering letter of Feb.28,1920.)

Your inquiry, I assume, relates to sales of patented or grant land, and for delinquent state and county taxes, and not for municipal or city taxes, and this report is made upon this assumption. If the inquiry relates to sales for delinquent municipal or city taxes, I would not be prepared to report without consulting the requirements of the particular district, although I am aware that the rules for state taxes apply generally, to the city tax procedure. And peculiar rules apply to unpatented land, or land the title to which has not left the state or government.

Tax titles, as you know, are to a large extent uncertain; they depend upon numerous contingencies, and they depend upon a strict compliance with all provisions of the law under which the sales are made. Such sales have been held invalid for the most insignificant matters, and for this reason they have come to be looked upon with distrust and

(Will - Community Property.)

The State of Texas
County of Galveston

I, Chauncy B. Sabin of Galveston, Texas, being of sound and disposing memory, but in feeble health do hereby made this my last will and testament, hereby revoking all previous wills and holding the same for naught.

I hereby desire that upon my death all my funeral expenses, expenses of last sickness, be first paid and discharged within such reasonable time as may be just and without embarrassing my estate to an improper degree.

2nd: It is my will that all other debts be next paid and discharged, the right of my wife and son to a homestead and other property exempted by law, and the years support to be first duly considered and protected.

3rd: My estate is entirely community property, real and personal, my wife having a separate property in Harris, conveyed to her by her brother Wm. P. Hamblen by deed many years ago in discharge of a trust growing out of separate funds belonging to her, placed in his hands for investment.

This property I make no disposition of but leave to her as her own individual property which I cannot dispose of.

The residue of all property is community property to which she is entitled to ½ of the proceeds thereof, after the payment of debts the other ½ is subject to my disposition by will or otherwise and I hereby will and bequeath my ½ of such community property to my son Lorenzo Sherwood Sabin of Galveston, Texas, said property is situated in Mills, Hood, Harris and Galveston Cos., Texas, so that on my death all of the said community property of myself and wife Mary A. Sabin will immediately vest in her and my said son and be subject to their disposition, subject to the payment of debts. It is my will that no action be had in the County Court upon my estate further than the probate of this